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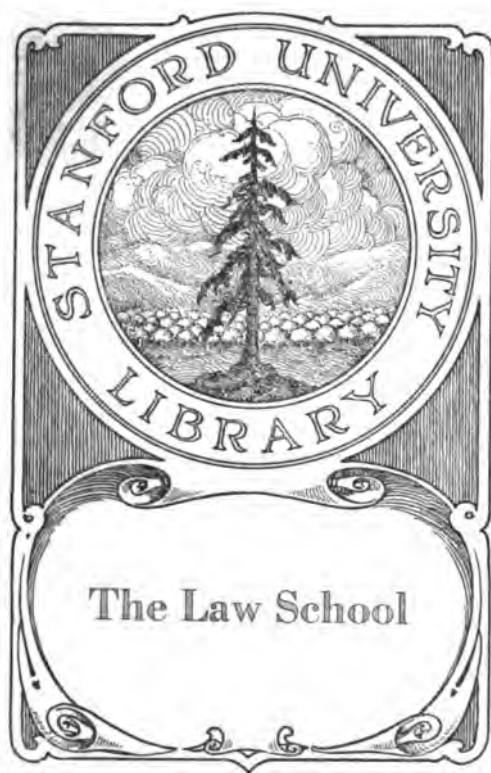
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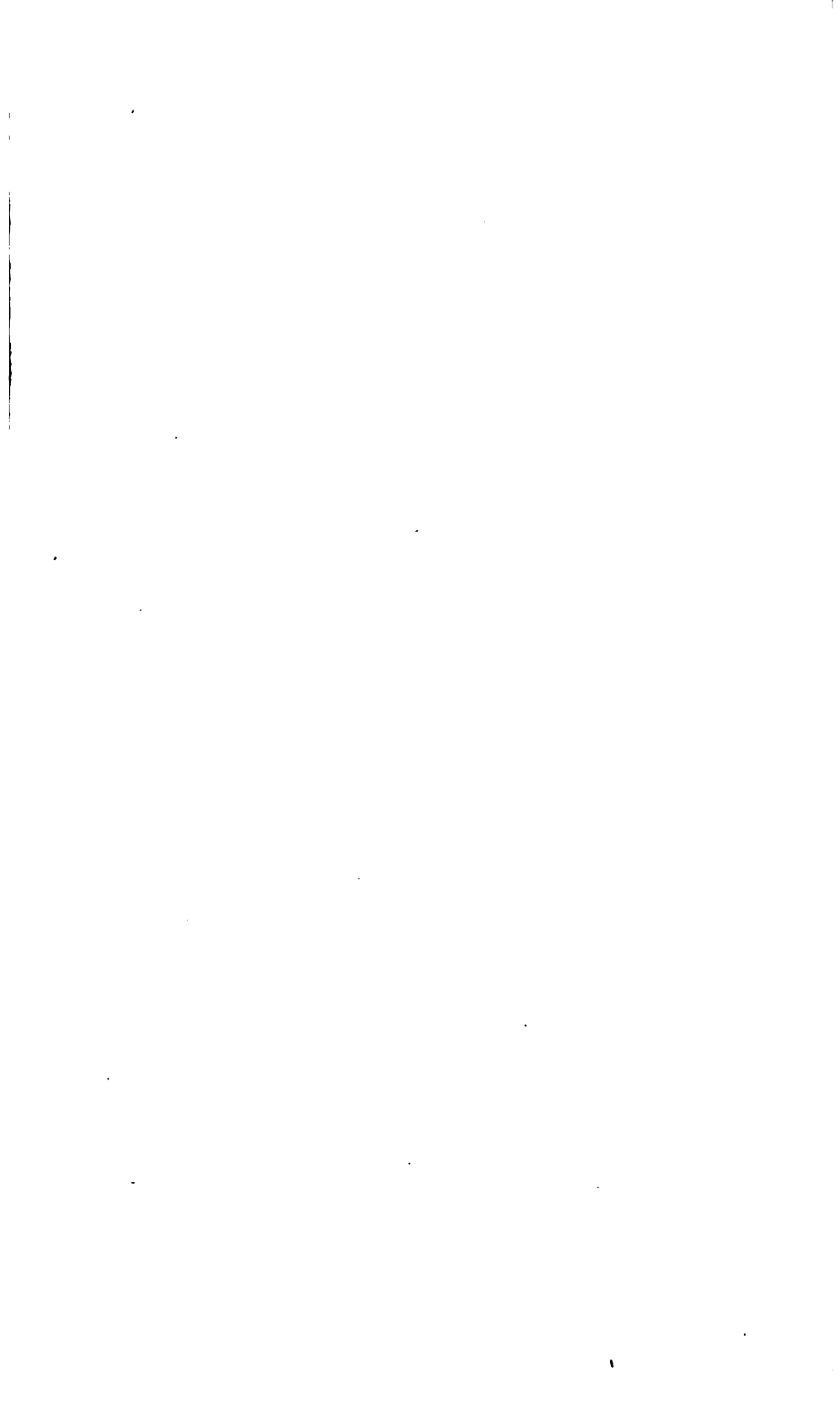
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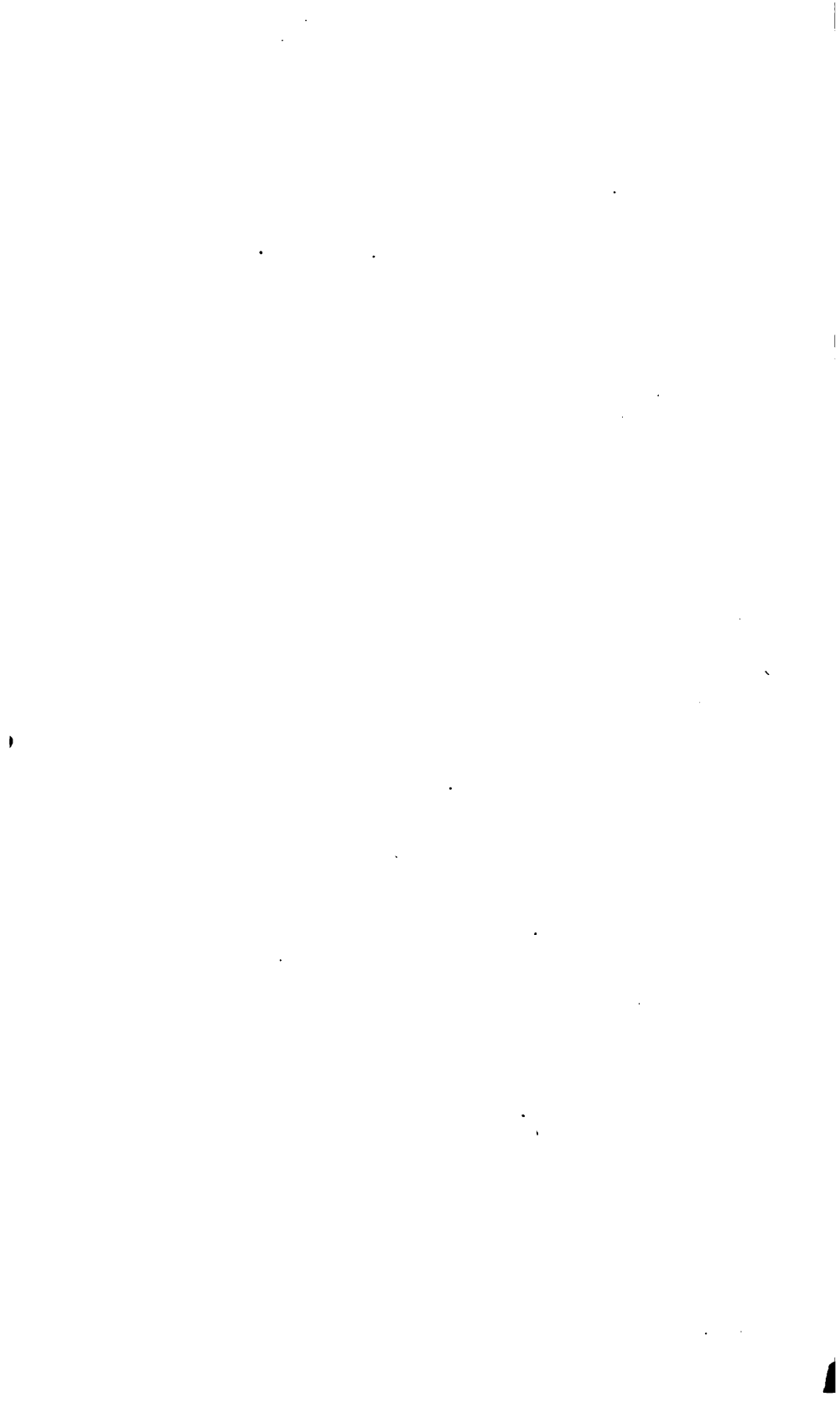
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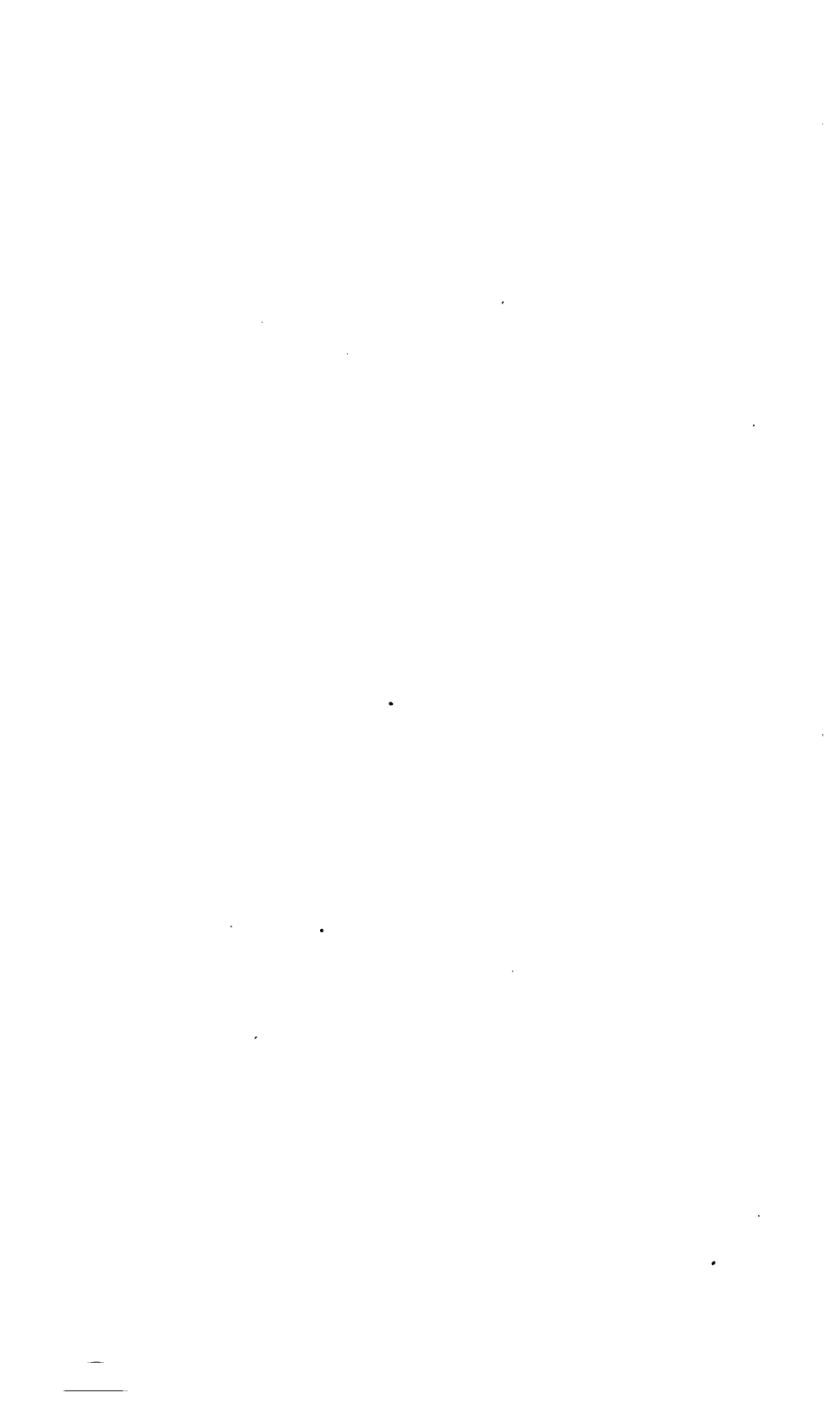
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

Gillaspie

EDITED BY

HENRY WHARTON, ESQ.

VOL. XCVI.

CONTAINING

THE CASES DETERMINED IN THE QUEEN'S BENCH AND IN THE EXCHEQUER
CHAMBER IN EASTER TERM, AND TRINITY TERM AND VACATION,
1853, XXI. AND XXII. VICTORIA.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

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R E P O R T S

OF

CASES

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COURT OF QUEEN'S BENCH,

AND THE

COURT OF EXCHEQUER CHAMBER

ON ERROR FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED, AND THE
PRINCIPAL MATTERS.

BY

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

COLIN BLACKBURN, OF THE INNER TEMPLE,

AND

FRANCIS ELLIS, OF THE INNER TEMPLE,

ESQRS., BARRISTERS AT LAW.

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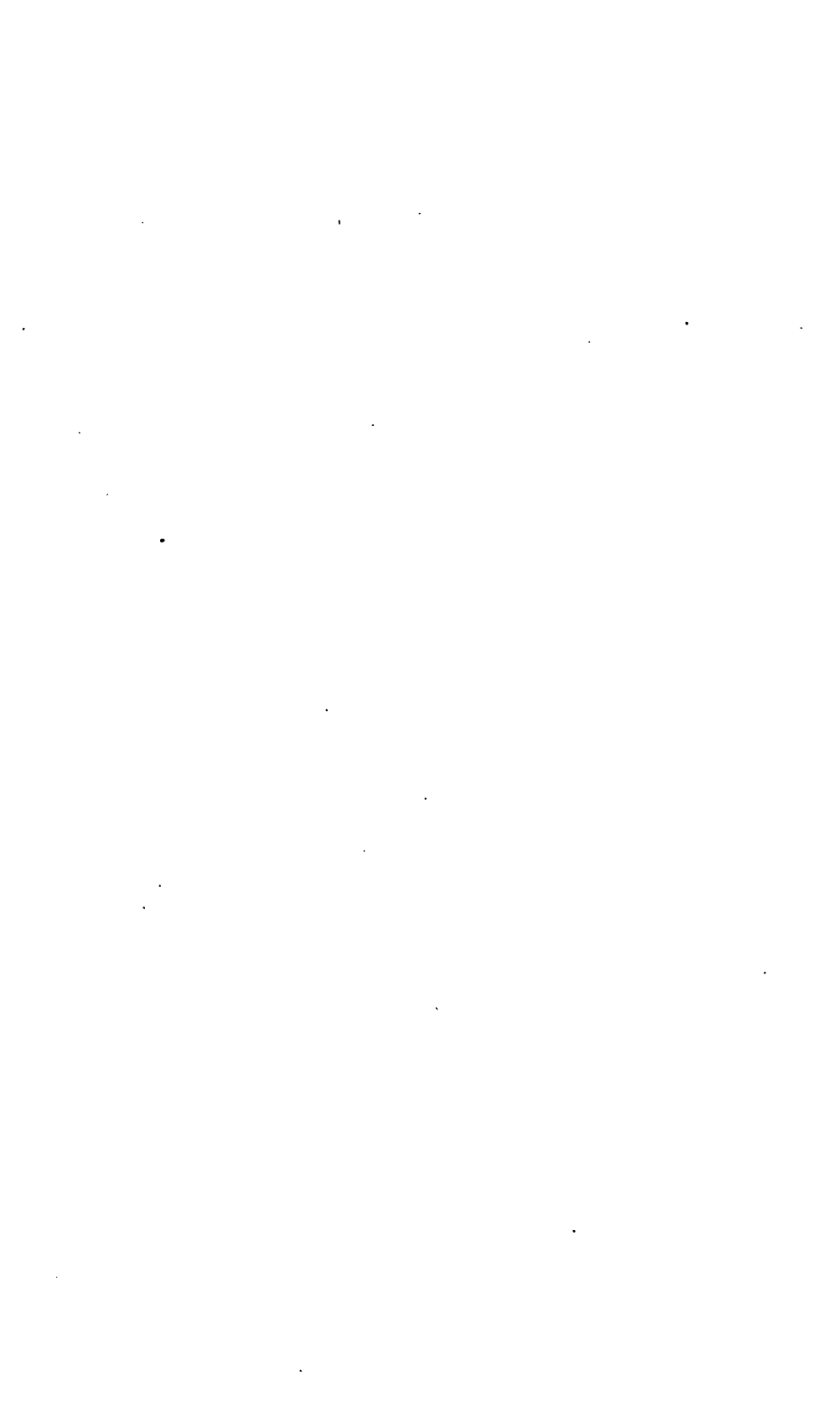
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JUDGES
OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. JOHN Lord CAMPBELL, C. J.
Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.
Sir WILLIAM ERLE, Knt.
Sir CHARLES CROMPTON, Knt.
Sir HUGH HILL, Knt.

ATTORNEY-GENERAL.
Sir FITZROY KELLY, Knt.

SOLICITOR-GENERAL.
Sir HUGH M'CALMONT CAIRNS, Knt.



A

TABLE

OF

THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

 The names of the additional cases are printed in *Italic*.

A.		C	
	PAGE		PAGE
Adams <i>v.</i> Lakeman	615	Cambridge, Mayor of, <i>v.</i> Dennis	660
Anderson <i>v.</i> Radcliffe	806	Carr <i>v.</i> Stringer	123
Anderson, Radcliffe <i>v.</i>	819	Carruthers, Syred <i>v.</i> : . . .	469
B.		Cattell <i>v.</i> Ireson	91
Backhouse, Bonomi <i>v.</i>	622	Chapman, Pemberton <i>v.</i> [. . .	1056
Barker, Jury <i>v.</i>	459	Chapman <i>v.</i> Rothwell	168
Bates, Hale <i>v.</i>	575	Cheetham, Beardsall <i>v.</i> . . .	243
Baxter, Hodsoll <i>v.</i>	884	Chesterfield Waterworks Company,	
Beachey <i>v.</i> Brown	796	Busby <i>v.</i>	176
Beardsall <i>v.</i> Cheetham	243	Clarke <i>v.</i> Dickson	148
Beecham <i>v.</i> Smith	442	Cole <i>v.</i> Bishop	note 150
Bendeno, Greig <i>v.</i>	133	<i>Corbett, White v.</i>	1102
Bennett <i>v.</i> Ireland	326	Crediton, Inhabitants of, Regina <i>v.</i>	231
Biddulph <i>v.</i> Lees	289	<i>Croft v. Lumley</i>	1069
Bishop, Cole <i>v.</i>	note 150	Cunard <i>v.</i> Hyde	670
Bonomi <i>v.</i> Backhouse	622	<i>Curlewis v. Earl of Mornington</i>	1106
Bristow, Lucas <i>v.</i>	907	D.	
British Empire Shipping Compa-		Dale <i>v.</i> Humfrey	1004
ny <i>v.</i> Somes	353	Dalyell <i>v.</i> Tyrer	899
Brown, Beachey <i>v.</i>	796	Dawson, Pearson <i>v.</i>	448
Busby <i>v.</i> Chesterfield Waterworks		Dean, Stone <i>v.</i>	504
Company	176	De Mattos, De Pothonier <i>v.</i> . .	461
Bush, Hart <i>v.</i>	494	Dennis, Cambridge, Mayor of, <i>v.</i>	660
Butler, Remfry <i>v.</i>	887	De Pothonier <i>v.</i> De Mattos . .	461

	PAGE		PAGE
Derbyshire, Justices of, Regina v.	69	Higgs v. Goodwin	529
Dickson, Clarke v. . . .	148	Hodgson v. Johnson	685
E.		Hodsoll v. Baxter	884
Ellis, Nicholson v. . . .	267	Holland, Ormond v. . . .	102
Ellis v. Nicholson	283, 1023	Hopkins, Re	100
Ellis v. Pearce	431	Hopper, Thompson v. . . .	1038
Elliss v. Elliss	81	Humfrey, Dale v. . . .	1604
Elliss, Ellies v. . . .	81	Hurstbourne Tarrant, Overseers	
Evans, Thomas v. . . .	171	of, Regina v. . . .	246
Evelyn v. Whichcord . . .	126	Hyde, Cunard v. . . .	670
Ex parte Lee, LL.D. . . .	863	I.	
Ex parte Lees	828	Ireland, Bennett v. . . .	326
F.		Ireson, Cattell v. . . .	91
Fischer v. Izataray	321	Irving, Mercer v. . . .	563
Fordingbridge, Inhabitants of, Regina v.	678	Izataray, Fischer v. . . .	321
Foster, Wheatcroft v. . . .	737	J.	
G.		Jackson v. Woolley [8 E. & B.	
Garton v. Great Western Railway		784 (E. C. L. R. vol. 92)]	886
Company	837	Jervis, Sandon v. . . .	985
Gasson, Hemmings v. . . .	346	Johnson, Hodgson v. . . .	685
Gladwin, Richardson v. . . .	138	Jones v. Thompson	63
Goodwin, Higgs v. . . .	529	Jury v. Barker	459
Great Western Railway Company,		K.	
Garton v. . . .	837	Kingston upon Thames, Justices	
Great Western Railway Company,		of, and Philips, Regina v. . .	256
Regina v. . . .	600	Kingston upon Thames, Justices	
Greig v. Bendeno	133	of, and Wedd, Regina v. . .	259
H.		Knight, Poplar Board of Works v.	408
Hackney and Lamberhurst Tithe		L.	
Commutation Rent-Charges . .	1	Lakeman, Adams v. . . .	615
Haigh v. North Bierley Union .	873	Lancashire, Justices of, v. Stret-	
Hale v. Bates	575	ford, Overseers of	225
Hall v. Taylor	107	Lee, LL.D., Ex parte	863
Hall v. Wright	746	Lee v. Stevenson	512
Harding, Prince of Wales Assu-		Lees, Biddulph v. . . .	289
rance Company v. . . .	183	Lees, Ex parte	828
Hardisty, Wheelton v. [8 E. & B.		Leesom, Melville v. . . .	324
285 (E. C. L. R. vol. 92)] . .	246	Levy, Lewis v. . . .	537
Hart v. Bush	494	Lewis v. Levy	537
Hemmings v. Gasson	346	London, Corporation of, Regina v.	509
Henly, Ockenden v. . . .	485	London Union, Guardians of, Wad-	
Higgins v. Seed, [8 E. & B. 771,		dington v. . . .	370
(E. C. L. R. vol. 92)]	930	Loring v. Warburton	507
		Lotinga, Pederson v. . . .	note 933

	PAGE		PAGE
Lucas v. Bristow	907	Prince of Wales Assurance Com-	
Lunley, Croft v. . . .	1069	pany v. Harding	183
M.		Q.	
McLean, Watson v. . . .	75, 78, 935	Queen, The, Mayor of Rochester	
Mainwaring, Regina v. . . .	474	v.	1024
Martyr, Penrose v. . . .	499	R.	
Melville v. Leesom	324	Radeliffe, Anderson v. . . .	806
Memorandum	1, 325, 872	Radeliffe v. Anderson	819
Mercer v. Irving	563	Ramsden, Regina v. . . .	949
Mornington, Earl of, Curlewis v.	1106	Randall v. Raper	84
N.		Raper, Randall v. . . .	84
Nicholson v. Ellis	267	Regina v. Crediton, Inhabitants of	231
Nicholson, Ellis v. . . .	283, 1023	Regina v. Derbyshire, Justices of	69
North Bierley, Overseers of, Re-		Regina v. Fordingbridge, Inhabit-	
gina v.	519	ants of	678
North Bierley Union, Haigh v.	873	Regina v. Great Western Railway	
North Eastern Railway Company,		Company	600
Waite v.	719	Regina v. Hurstbourne Tarrant,	
North Staffordshire Railway Com-		Overseers of	246
pany, Peek v.	958	Regina v. Kingston upon Thames,	
North Staffordshire Railway Com-		Justices of, and Philips	256
pany v. Peek	986	Regina v. Kingston, Justices of,	
Nunneley, Regina v. . . .	852	and Wedd	259
O.		Regina v. London, Corporation of	509
Ockenden v. Henly	485	Regina v. Mainwaring	474
Oglesby v. Yglesias	930	Regina v. North Bierley, Over-	
Ormond v. Holland	102	seers of	519
P.		Regina v. Nunneley	852
Pearce, Ellis v.	431	Regina v. Ramsden	949
Pearson v. Dawson	448	Regina v. Richmond, Recorder of	253
Pederson v. Lotinga	note 923	Regina v. St. Mary, Islington,	
Peek, North Staffordshire Railway		Vestry of	743
Company v.	986	Regina v. St. Pancras, Directors of	583
Peek v. North Staffordshire Rail-		Regina v. Sudbury Burial Board	264
way Company	958	Regina v. West Riding of York-	
Peeke, Preston v.	336	shire, Justices of	713
Pemberton v. Chapman	1056	Regina v. Woods	481
Penrose v. Martyr	499	Regula Generalis	255
Phoenix Life Assurance Company,		Re Hopkins	100
Sheridan v.	156	Remfry v. Butler	887
Plymouth General District Rate	691	Richardson v. Gladwin	138
Poplar Board of Works v. Knight	408	Richmond, Recorder of, Regina v.	253
Preston v. Peeke	326	Rochester, Mayor of, v. The	
		Queen	1024
		Rothwell, Chapman v. . . .	168

		PAGE			PAGE
S.			Tucker, Warburg v.		
St. Mary, Islington, Vestry of,			Tyrer, Dalyell v.		914
Regina v.	743		V.		
St. Pancras, Directors of, Regina			Valkenhuysen, Stein v.		65
v.	583		W.		
Sandon v. Jervis	935		Waddington v. London Union,		
Seed, Higgins v. [8 E. & B. 771			Guardians of		370
(E. C. L. R. vol. 92)]	930		Waite v. North Eastern Railway		
Sheridan v. Phoenix Life Assu-			Company		719
rance Company	156		Warburg v. Tucker		914
Smith, Beecham v.	442		Warburton, Loring v.		507
Somes, British Empire Shipping			Watson v. McLean		75, 78, 935
Company v.	353		West Riding of Yorkshire, Jus-		
South Eastern Railway Company,			tices of, Regina v.		713
Whitfield v.	115		Wheatcroft v. Foster		737
Stein v. Valkenhuysen	65		Wheelton v. Hardisty [8 E. & B.		
Stevenson, Lee v.	512		285 (E. C. L. R. vol. 92)]		246
Stone v. Dean	504		Whicheord, Evelyn v.		126
Stretford, Overseers of, Lanca-			White v. Corbett		1102
shire, Justices of, v.	225		Whitfield v. South Eastern Rail-		
Stringer, Carr v.	123		way Company		115
Sudbury Burial Board, Regina v.	264		Woods, Regina v.		481
Syred v. Carruthers	469		Woolley, Jackson v. [8 E. & B.		
T.			784 (E. C. L. R. vol. 92)]		886
Taylor, Hall v.	107		Wright, Hall v.		746
Thomas v. Evans	171		Y.		
Thompson, Jones v.	63		Yglesias, Oglesby v.		930
Thompson v. Hopper	1038				

TABLE OF CASES CITED.

A.

	PAGE
Adair v. Shaw, 1 Sch. & Lef. 266	1063
Addison v. Preston, Mayor, &c., of, 12 Com. B. 108	111
Aga Kurboolie Mahomed v. The Queen, 4 Moore's P. C. C. 239	945
Agar v. Athenæum Life Assurance Society, 3 Com. B. N. S. 725	222
Aldred's Case, 9 Rep. 57 b	636
Allen v. Hayward, 7 Q. B. 960	902
Alner v. George, 1 Campb. 392	579
Alsop v. Price, 1 Doug. 160	921
Andrew v. Hancock, 1 B. & B. 37	47
Anonymous Case, Styles 392	119
Anonymous Case, 7 Mod. 8	939
Anonymous Case, 1 Ventr. 306	946
Arlington, Lord, v. Merricke, 2 Wms. Saund. 403	664
Arnold v. Poole, Mayor of, 4 M. & G. 860	877
Ashby v. White, 2 Ld. Raym. 938	633, 725
Atchinson v. Baker, 2 Peake's N. P. C. 103	754
Atkinson v. Abbott, 11 East 135, S. C. 1 Campb. 535	673
Atkinson v. Ritchie, 10 East 530	789
Atkyns v. Kinnier, 4 Exch. 776	574
Attorney-General v. Radloff, 10 Exch. 84	92
Avery v. Bowden, 5 E. & B. 714	783
Avery v. Bowden, 6 E. & B. 953	783
Austin v. Manchester, &c., Railway Company, 10 Com. B. 454	968
Anstralian Royal Mail Steam Navigation Company v. Marzetti, 11 Exch. 228,	878

B.

Baddeley v. Mortlock, 1 Holt's N. P. C. 151	754, 798
Baddley v. Oliver, 1 Cr. & M. 219	124
Bailey's Case, 3 E. & B. 607	858
Baker v. Tucker, 3 H. L. Ca. 106	299
Bank of Columbia v. Patterson, 7 Cranch 299	878
Bargate v. Shortridge, 5 H. L. Ca. 297	201
Barker v. Hodgson, 3 M. & S. 267	762
Barnett v. Guildford, Earl of, 11 Exch. 19	811
Barrett v. Long, 3 H. L. Ca. 395	351
Bartlett v. Purnell, 4 A. & E. 792	1015
Barwell v. Adkins, 1 M. & G. 807	351
Barwis, Ex parte, 25 L. J., N. S. Bank. 10	918
Bateman v. Phillips, 15 East 272	1002, 1008
Bayley v. Fitzmaurice, 8 E. & B. 664	1015

	PAGE
Beecher's Case, 8 Rep. 58 a	96
Bell v. Carstairs, 14 East 374	1041
Belshaw v. Bush, 11 Com. B. 191	211
Bennett v. Burton, 12 A. & E. 657	923
Berwick, Mayor of, v. Oswald, 1 E. & B. 295	664
Berwick, Mayor of, v. Oswald, 3 E. B. 653	664
Beverley v. Lincoln Gas Light and Coke Company, 6 A. & E. 829	877
Bill v. Darenth Valley Railway Company, 1 H. & N. 305	199
Bird v. Appleton, 8 T. R. 566	675
Biss v. Smith, 2 H. & N. 105	303
Blackburn v. Smith, 2 Exch. 783	150
Blagg v. Sturt, 1 Q. B. 899	350
Blake v. Midland Railway Company, 12 Q. B. 93	169
Blakemore v. Bristol and Exeter Railway Company, 8 E. & B. 1035	104, 904
Blofield v. Payne, 4 B. & Ad. 410	653
Bogg v. Pearce, 10 Com. B. 534	108
Booth v. Kennard, 1 H. & N. 527	535
Bosanquet v. Shortridge, 4 Exch. 699	201
Bosanquet v. Wray, 6 Taunt. 597	444
Bostock v. North Staffordshire Railway Company, 4 E. & B. 798	204
Bovill v. Keyworth, 7 E. & B. 725	536
Bower v. Hill, 1 New Ca. 549	653
Bowman v. Blyth, 7 E. & B. 26	1025
Boydell v. Drummond, 11 East 142	988
Bradyll v. Ball, 1 Bro. C. C. 427	366
Bridge v. Grand Junction Railway Company, 3 M. & W. 244	730
Brind v. Dale, 2 M. & W. 775	987
Bromage v. Prosser, 4 B. & C. 247	118
Brown v. Byrne, 3 E. & B. 703	911
Brown v. Howard, 2 Br. & B. 73	653
Bryan v. Whistler, 8 B. & C. 288	516
Bunbury v. Fuller, 9 Exch. 111, 140	858
Burgh v. Preston, 8 T. R. 483	205
Bushel v. Wheeler, (Note to Morton v. Tibbett), 15 Q. B. 442	497
Buss v. Gilbert, 2 M. & S. 70	63
Butterfield v. Forester, 11 East 60	730

C.

Caffrey v. Darby, 6 Ves. 488, 496	1054
Caledonian Railway Company v. Sport, 2 Macq. Sc. App. 449	655
Calvin's Case, 7 Rep. 1 a, 20 a	833
Camfield v. Bird, 3 C. & K. 56	351
Campbell v. Fleming, 1 A. & E. 40	150
Carr v. Jackson, 7 Exch. 382	1020
Carr v. Lancashire and Yorkshire Railway Company, 7 Exch. 707	968
Cattlin v. Hills, 8 Com. B. 123	725
Chadwick v. Trower, 6 New Ca. 1	636
Chamberlain v. Williamson, 2 M. & S. 408	755
Chambres v. Jones, 5 Exch. 229	111
Chanell v. Robotham, Yelv. 68	79
Charles, Ex parte, 14 East 197	63
Charlton v. Watton, 6 C. & P. 385	549
Chase v. Westmore, 5 M. & S. 180	361
Chelmsford Union, Guardians of, v. Chelmsford Local Board of Health, 2 E. & B. 500, note (a)	702

	PAGE
Chelsea Waterworks Company v. Bowley, 17 Q. B. 358	515
Chesterton v. Farlar, 1 Curt. Eccl. R. 345. 2 Curt. Eccl. R. 77	398
Chetham v. Williamson, 4 East 469	516
Church v. Imperial Gas Light and Coke Company, 6 A. & E. 846	880
Clare v. Maynard, 6 A. & E. 519	88
Clarke v. Cuckfield Union, 1 Low. & M. 81	877
Clay v. Stephenson, 3 A. & E. 807	322
Clay v. Stephenson, 7 A. & E. 185	322
Clegg v. Dearden, 12 Q. B. 576	633
Clement, In the matter of, 11 Price 68	545
Cockell v. Taylor, 14 Beav. 103, 116	826
Cocking v. Ward, 1 Com. B. 858	688
Coggs v. Bernard, 2 Ld. Raym. 909	473
Coles v. Bank of England, 10 A. & E. 437	850
Collen v. Wright, 7 E. & B. 301	150
Collen v. Wright, 8 E. & B. 647	87
Collins v. Godefroy, 1 B. & Ad. 950	578
Colvin v. Newberry, 8 B. & C. 166; 1 Cl. & F. 283	903
Cooke v. Wilson, 1 Com. B. N. S. 153	932
Cookes v. Bellamy, 1 Sid. 188	1062
Cope v. Thames Haven Dock and Railway Company, 3 Exch. 442	881
Cordling, Ex parte, 4 B. & Ad. 198	473
Cox v. Coleridge, 1 B. & C. 37	548
Craft v. Boite, 1 Wms. Saund. 242 a	120
Craib v. D'Aeth, Note (b) to Bauerman v. Radenius, 7 T. R. 670	466
Crane v. Price, 4 M. & G. 580. S. C. Webster's Reports, &c., on Letters Patent 377	535
Craw v. Ramsey, Vaughan 274	833
Cross v. Collins, 5 New Ca. 194	124
Curry v. Walter, 1 B. & P. 525	543
Curry v. Walter, 1 Esp. 456	547
Curtis v. Hubbard, 1 Hill's New York Rep. 337	945

D.

Dacre v. Doe dem. Dacre, 8 T. R. 112	301
Dale v. Pollard, 10 Q. B. 504	857
Dartmouth, Mayor of, v. Silly, 7 E. & B. 97	663
Dartnall v. Howard, 4 B. & C. 345	905
Davis v. Garrett, 6 Bing. 716	1041
Davison v. Duncan, 7 E. & B. 229	545
Daubney v. Cooper, 10 B. & B. 237	548
De la Rue v. Dickenson, 7 E. & B. 738	536
Denn dem. Manifold v. Diamond, 4 B. & C. 243	400
Deposit Life Assurance v. Ayscough, 6 E. & B. 761	150
Diggle v. London and Blackwall Railway Company, 5 Exch. 442	878
Dill v. Haddington, Earl of, 8 Cl. & F. 168	310
Dixon v. Bovill, 3 Mac. Rep. H. L. 1, 18	453
Dixon v. Yates, 5 B. & Ad. 313	455
Doe v. Trye, 6 Mod. 173. S. C. 1 Salk. 79	944
Doe dem. Blandford v. Applin, 4 T. R. 82	303
Doe dem. Dacre v. Dacre, 1 B. & P. 250	301
Doe dem. Poole v. Errington, 1 A. & E. 750	83
Doe dem. Gallini v. Gallini, 5 B. & Ad. 640	313
Doe dem. Gallini v. Gallini, 3 A. & E. 340	313

	PAGE
Doe dem. Bean v. Halley, 8 T. R. 5	301
Doe dem. Wright v. Jesson, 5 M. & S. 95	313
Doe dem. Comberbach v. Perryn, 3 T. R. 484	310
Doe dem. Littledale v. Smeddle, 2 B. & Ald. 126	301
Doe dem. Hawley v. Wood, 2 B. & Ald. 724	515
Doe dem. Luscombe v. Yates, 5 B. & Ald. 544	312
Drew v. Coles, 2 Cr. & J. 505	124
Duncan v. Thwaites, 3 B. & C. 556	545
Duncomb's, Sir Edward, Case, Cro. Car. 336. S. C. 1 Rol. Abr. 390	951
Durrant v. Boys, 6 T. R. 580	384

E.

East Anglian Railways Company v. Eastern Counties Railway Company, 11 C. B. 803, 813	209
East London Waterworks Company v. Trustees for Mile End Old Town, 17 Q. B. 512	702
Eastern Counties Railway Company v. Broom, 6 Exch. 314	117
Egerton v. Earl Brownlow, 1 Sim. N. S. 464	314
Egerton v. Earl Brownlow, 4 H. L. Ca. 209	314
Eggington's Case, 2 E. & B. 717	97
Elder v. Beaumont, 8 E. & B. 353	918
Elton v. Eason, 19 Ves. 73	131
Embrey v. Owen, 6 Exch. 353	633
Ernest v. Nicholls, 6 H. L. Ca. 401	203, 393, 881

F.

Fairbrass v. Pettit, 12 M. & W. 453	124
Farlar v. Chesterton, 2 Moore's P. C. C. 330	398
Faulkner v. Elger, 4 B. & C. 449	143
Fenton v. City of Dublin Steam Packet Company, 8 A. & E. 835	902
Feret v. Hill, 15 Com. B. 207	814
Ferguson v. Carrington, 9 B. & C. 59	150
Fetter v. Beal, 1 Ld. Raym. 339, 692. S. C. 1 Salk. 11	641
Finlay v. Bristol and Exeter Railway Company, 7 Exch. 409	880
Finnerty v. Tipper, 2 Camp. 72	351
Firmstone v. Wheeley, 13 L. J. N. S. Exch. 361. S. C. 2 D. & L. 303	633
Fish's, Sir William, Case, cited in White v. Wiltshire, 2 Rol. R. 130. S. C. Palm. 53	943
Fitzmaurice v. Bayley, 6 E. & B. 868. S. C. Dom. Proc. Aug. 3, 1860]	1015
Foster v. Bates, 12 M. & W. 226	1062
Foster v. Hayes, 2 E. & B. 27	299
Foster v. Hayes, 4 E. & B. 717	299
Foulkes v. Sellway, 3 Esp. 236	754
Franklin v. Hosier, 4 B. & Ald. 341	362
Freud v. Dennett, 4 Com. B. N. S. 576	881
Friar v. Grey, 5 Exch. 584, 597	314
Furnivall v. Coombes, 5 M. & G. 736	933

G.

Galsworthy v. Strutt, 1 Exch. 659	569
Gambier v. Overseers of Lydford, 3 E. & B. 346	229
Jenner v. Sparks, 6 Mod. 173. S. C. 1 Salk. 79	939
Gibson v. Small, 4 H. L. Ca. 353	1052

TABLE OF CASES CITED.

xv

	PAGE
Gibson v. Winter, 5 B. & Ad. 96	445, 464
Gillon v. Boddington, Ry. & M. 161	642
Gladwin v. Steggall, 5 New Ca. 733	902
Glynn v. Thomas, 11 Exch. 870	508
Gordon v. Sea Fire Life Assurance Society, 1 H. & N. 599	201
Great Northern Railway Company v. Eastern Counties Railway Company, cited 11 Com. B. 813	209
Green v. Kopke, 18 Com. B. 549	932
Green v. Price, 13 M. & W. 695	574
Green v. Saddington, 7 E. & B. 503	688
Greenland v. Chaplin, 5 Exch. 243	730
Greenstreet v. Cumyns, 2 Phil. Ca. Ecc. 10	774
Greenwood's Case, 3 De G. M. & G. 459	201
Grey v. Friar, 4 H. L. Ca. 565	314

H.

Hadley v. Baxendale, 9 Exch. 341	87
Hadley v. Clarke, 8 T. R. 259	789
Halford v. Kymer, 10 B. & C. 724	169
Hall v. Hallet, 1 Cox. Ca. Eq. 134	814
Hall v. Janson, 4 E. & B. 500	911
Hamlin v. Great Northern Railway Company, 1 H. & N. 408	87
Hammond v. Messenger, 9 Sim. 327	465
Hankin v. Bennett, 8 Exch. 107	922
Hanson v. Armitage, 5 B. & Ald. 557	496
Harman v. Anderson, 2 Camp. 243	453
Harrington v. Long, 2 Myl. & K. 590	813
Harrison v. Cage, Carth. 467; 1 Ld. Raym. 386, 772	800
Harrison v. Stickney, 2 H. L. Ca. 108	386
Hart v. Sattley, 3 Camp. 528	497
Hartley v. Hitchcock, 1 Stark. 408	366
Hartley v. Russell, 2 Sim. & S. 244	813
Hawes v. Watson, 2 B. & C. 540	453
Hay v. Coventry, Earl of, 3 T. R. 83	303
Henderson v. Australian Royal Mail Steam Navigation Company, 5 E. & B. 409	878
Henly v. Walsh, 2 Salk. 686	366
Hill v. Manchester and Salford Waterworks Company, 5 B. & Ad. 866	208
Hill v. Manchester and Salford Waterworks Company, 2 B. & Ad. 544	221
Hinde v. Whitehouse, 7 East 558	1001
Hitchcock v. Coke, 6 A. & E. 438	574
Hitchcock v. Hunter, 5 Jurist 770	66
Hoare v. Silverlock, 9 Com. B. 20	548
Hochster v. De la Tour, 2 E. & B. 678	766
Hodgson v. Local Board of Health of Carlisle, 8 E. & B. 116	229
Hodson v. Stallbrass, 11 A. & E. 301	653
Holmes v. Mitchell, 7 Com. B. N. S. 361	1002
Holt v. Clarencieux, 2 Str. 937	801
Homersham v. Wolverhampton Waterworks Company, 6 Exch. 137	880
Horton v. Westminster Improvement Commissioners, 7 Exch. 780	222
Howell v. London Dock Company, 8 E. & B. 212	37, 613
Howell v. Young, 5 B. & C. 259	633
Hubbard v. Beckford, 1 Hag. Con. R. 307	32
Humfrey v. Dale, 7 E. & B. 266	911, 1004
Humphries v. Brogden, 12 Q. B. 744	642

	PAGE
Hunt v. Silk, 5 East 449	151
Hunter v. Gibbons, 1 H. & N. 459	465
Hutton v. Warren, 1 M. & W. 466	1008
Hyde v. Johnson, 2 New Ca. 776	989

I.

Imperial Gas Light and Coke Company v. London Gas Company, 10 Exch. 39	633
Iceley v. Grew, 6 N. & M. 467	490
Irving v. Greenwood, 1 C. & P. 350	754, 798
Ives v. Legge, Note (a) to Doe dem. Comberbach v. Perryn, 3 T. R. 488	301
Izon v. Gorton, 5 New Ca. 501	331

J.

Jackson v. Cummins, 5 M. & W. 342	361
Jenkins v. Heycock, 8 Moore P. C. C. 351	1649
Jenkins v. Plombe, 6 Mod. 93	1062
Jennings v. Randall, 8 T. R. 335	903
Jesson v. Doe dem. Wright, 2 Bligh 56	313
Johnson v. Goslett, 18 Com. B. 728	152
Johnson v. Goslett, 3 Com. B. N. S. 569	152
Jones v. Johnson, 5 Exch. 862	387
Jones v. Johnson, 7 Exch. 452	387
Jones v. Yates, 9 B. & C. 532	464
Judson v. Etheridge, 1 C. & M. 743	361

K.

Kearslake v. Morgan, 5 T. R. 513	211
Keele v. Wheeler, 7 M. & G. 665	205
Kelly v. Webster, 12 Com. B. 283	689
Kemble v. Farren, 6 Bing. 141	568
Kendall v. King, 17 Com. B. 483	110
Kent v. Great Western Railway Company, 3 Com. B. 714	843
Kenworthy v. Schofield, 2 B. & C. 945	1001, 1015
King v. Hoare, 13 M. & W. 494	443
Kingsbridge Flour Mill Company v. Plymouth Grinding and Baking Company, 2 Exch. 718	204
Kingsford v. Merry, 11 Exch. 577	150
Knight v. Bowyer, 2 De G. & J. 421	822

L.

Lamprell v. Billericay Union, 3 Exch. 283	881
Lancaster Canal Company v. Parnaby, 11 A. & E. 223, 230	170
Langford v. Ellis, 14 East 202, note (b)	63
Larchin v. Willan, 4 M. & W. 351	66
Laugher v. Pointer, 5 B. & C. 547	902
Lawrence v. Twentiman, 1 Rol. Abr. 450, <i>Condition</i> (G), pl. 10	758
Lee v. Gansel, 1 Cowp. 1	938
Leeds v. Cook, 4 Esp. 256	754
Legge v. Tucker, 1 H. & N. 500	903
Legh v. Legh, 1 B. & P. 447	465
Lennard v. Robinson, 5 E. & B. 125	932
Lenton v. Cook, Bull. N. P. 45	363
Lewis v. Clement, 3 B. & Ald. 702	546

TABLE OF CASES CITED.

xvii

	PAGE
Lewis v. Walter, 4 B. & Ald. 605	547
Lewis dem. Ormond v. Waters, 6 East 336	301
Lindus v. Melrose, 2 H. & N. 293	502
Litchfield v. Ready, 5 Exch. 939	811
Load v. Green, 15 M. & W. 216	150
London Dock Company v. Sinnott, 8 E. & B. 347	208, 881
London and North Western Railway Company v. Dunham, 18 Com. B. 826	969
London, Port of, Assurance Company's Case, 5 De G. M. & G. 465	203
Longmeid v. Holliday, 6 Exch. 761	903
Lowe v. North Western Railway Company, 18 Q. B. 632	878
Lowe v. Peers, 4 Burr. 2225	568, 778
Ludlow, Mayor of, v. Charlton, 6 M. & W. 815	877
Lumley v. Gye, 3 E. & B. 114	322
Lyburn v. Warrington, 1 Stark. N. P. C. 162	205
Lygo v. Newbold, 9 Exch. 302	731
Lynch v. Nurdin, 1 Q. B. 29	726

M.

McEwan v. Smith, 2 H. L. Ca. 309	453
McFee, Ex parte, 9 Exch. 261	858
McGregor v. Thwaites, 3 B. & C. 24	549
MacLeod v. Wakley, 3 C. & P. 311	351
M'Manus v. Lancashire Railway Company, 2 H. & N. 693	969
M'Manus v. Lancashire Railway Company, 4 H. & N. 327	969
Maples v. Pepper, 18 Com. B. 177	924
Mare v. Charles, 5 E. & B. 978	502
Marshall v. York, Newcastle and Berwick Railway Company, 11 Com. B. 655	903
Martin v. Great Northern Railway Company, 16 Com. B. 179	726
Maund v. Monmouthshire Canal Company, 4 M. & G. 452	117
Mayhew v. Herrick, 7 Com. B. 229	821
Mellor v. Spateman, 1 Wms. Saund. 346 a, b note (2)	640
Mercer v. Sparks, Owen 51. Noy 35	119
Meredith v. Meigh, 2 E. & B. 364	496
Metropolitan Association v. Petch, 5 Com. B. N. S. 504	653
Metropolitan Board of Works v. Vauxhall Bridge Company, 7 E. & B. 964	35
Milligan v. Wedge, 12 A. & E. 737	902
Minter v. Williams, 4 A. & E. 251	536
Moffatt v. Van Millingen, Note to Mainwaring v. Newman, 2 B. & P. 124	444
Montefiori v. Montefiori, 1 W. Bl. 363	579
Montoya v. London Assurance Company, 6 Exch. 451	1046
Moore v. Campbell, 10 Exch. 323	1007
Morgan, Ex parte, 1 Macn. & G. 225	202
Morgan v. Griffiths, 1 Cowp. 234	301
Mortimer v. Mortimer, 2 Hagg. Con. C. 301	771
Morton v. Tibbett, 15 Q. B. 428	497
Murray v. Mann, 2 Exch. 538	150
Myers, Ex parte, Mont. & Bl. 229	923

N.

National Assurance Association v. Best, 2 H. & N. 6 5	928
Neale v. Turton, 4 Bing. 149	444
Newberry v. Colvin, 7 Bing. 190. S. C. 1 Cr. & J. 192	903
Newton, Ex parte, 4 E. & B. 869	834
E., B. & E.—2	

	PAGE
Nicholl v. Darley, 2 Y. & J. 399	938
Nicklin v. Williams, 10 Exch. 259	635

O.

Oakley, Lord, v. Kensington Canal Company, 5 B. & Ad. 138	633
Oswald v. Berwick upon Tweed, Mayor, Aldermen and Burgesses of, 5 H. L. Ca. 856	664
Owen v. Legh, 3 B. & Ald. 470]	821

P.

Paine v. Strand Union, 8 Q. B. 326	877
Palmer v. Temple, 9 A. & E. 508	491
Paradine v. Jane, Aleyn 26	761
Pardington v. South Wales Railway Company, 1 H. & N. 392	968
Park v. Percival, Hob. 62 (5th ed.)	944
Parker v. Ince, 4 H. & N. 53	929
Parker v. Winlow, 7 E. & B. 942	932
Parmeter v. Parmeter,	775
Parnaby v. Lancaster Canal Company, 11 A. & E. 223	170
Partridge v. Scott, 3 M. & W. 220	636
Pearson v. Lemaitre, 5 M. & G. 700	351
Peddell v. Gwyn, 1 H. & N. 590	200
Pederson v. Lotinga, 28 Law Times 267	933
Pemberton v. Chapman, 7 E. & B. 210	1058
Pennell v. Alexander, 3 E. & B. 283	1007
Peppin v. Cooper, 2 B. & Ald. 431	665
Peterson v. Ayre, 13 Com. B. 353	88
Phillips v. Clagett, 11 M. & W. 84	465
Pieschell v. Allnutt, 4 Taun. 792	674
Pippin v. Sheppard, 11 Price 400	902
Planché v. Fletcher, 1 Doug. 251	673
Port of London Assurance Company's Case, 5 De G. M. & G. 465	203
Portsmouth, Countess of, v. Portsmouth, Earl of, 1 Hagg. C. Eco. 355	775
Price v. Green, 16 M. & W. 346	574
Price v. Leyburn, Gow 109	688
Prosser v. Edmonds, 1 Y. & C. Exch. Eq. 481, 497	826
Pugh v. Griffith, 7 A. & E. 827	939
Pybus v. Gibbs, 6 E. & B. 902	666

Q.

Quarman v. Burnett, 6 M. & W. 499	730, 902
---	----------

R.

Ramsbottom v. Buckhurst, 2 M. & S. 565	342
Ranson v. Camplin, 2 Rob. Eco. Ca. 370 [.	143
Reed v. Jackson, 1 East 355	341
Reedie v. London and North Western Railway Company, 4 Exch. 244	730
Regina v. Ashton, 1 E. & B. 286	136
Regina v. Badcock, 6 Q. B. 787	228
Regina v. Bolton, 1 Q. B. 66	856
Regina v. Bristol, Governor, &c., of Poor of, 13 Q. B. 405	588
Regina v. Burnaby, 2 Id. Raym. 900	857
Regina v. Cambridgeshire, Justices of, 7 A. & E. 480	131

	PAGE
<i>Regina v. Capel</i> , 12 A. & E. 382	26
<i>Regina v. Carlisle</i> , 2 B. & Ad. 362	342
<i>Regina v. Colling</i> , 17 Q. B. 816	856
<i>Regina v. Cridland</i> , 7 E. & B. 853	95, 857
<i>Regina v. Dayman</i> , 7 E. & B. 672	856
<i>Regina v. Eastern Counties Railway Company</i> , 5 E. & B. 974	483
<i>Regina v. Grand Junction Railway Company</i> , 4 Q. B. 18	29
<i>Regina v. Great North of England Railway Company</i> , 2 Q. B. 315	117
<i>Regina v. Harrogate Commissioners</i> , 15 Q. B. 1012	228
<i>Regina v. Harwich, Mayor of</i> , 1 E. & B. 617	1025
<i>Regina v. Hyde, Note (a) to Regina v. Cridland</i> , 7 E. & B. 859	95
<i>Regina v. Lancashire, Justices of</i> , 12 East 366	250
<i>Regina v. Lancashire, Justices of</i> , 4 Q. B. 910	715
<i>Regina v. Leicestershire, Justices of</i> , 8 E. & B. 557	72
<i>Regina v. Lichfield, Mayor of</i> , 1 Q. B. 453	1025
<i>Regina v. London and South Western Railway Company</i> , 1 Q. B. 558	59
<i>Regina v. Lumsdaine</i> , 10 A. & E. 157	32
<i>Regina v. Millis</i> , 10 Cl. & F. 534	203, 774, 801
<i>Regina v. Minister</i> , 14 Q. B. 349	239
<i>Regina v. Nevill</i> , 8 Q. B. 452	702
<i>Regina v. North Bierly, Overseers of</i> , E., B. & E. 519	1037
<i>Regina v. Padwick</i> , 8 E. & B. 704	125
<i>Regina v. Parker</i> , 7 E. & B. 155	258, 263
<i>Regina v. Peterborough, Justices of</i> , 7 E. & B. 643	714
<i>Regina v. Poor Law Commissioners (Allstonefield Incorporation)</i> , 11 A. & E. 558	588
<i>Regina v. Poor Law Commissioners, In re St. Giles and St. George</i> , 17 Q. B. 445	596
<i>Regina v. Read</i> , 13 Q. B. 524	406
<i>Regina v. Rhyddlan</i> , 14 Q. B. 327	239
<i>Regina v. Richmond, Recorder of</i> , E. B. & E. 253	717
<i>Regina v. Rochester, Mayor of</i> , 7 E. & B. 910	526, 1025
<i>Regina v. St. Andrew, Governors of</i> , 6 Q. B. 78	588
<i>Regina v. St. Michaels, Southampton</i> , 6 E. & B. 807	249
<i>Regina v. St. Pancras, Vestrymen of</i> , 11 A. & E. 15	1025
<i>Regina v. Sevenoaks</i> , 7 Q. B. 136	714
<i>Regina v. Slawstone</i> , 18 Q. B. 388	255, 717
<i>Regina v. Southampton Dock Company</i> , 14 Q. B. 587	34
<i>Regina v. Stafford, Marquis of</i> , 7 East 521	301
<i>Regina v. Stamford, Mayor of</i> , 6 Q. B. 433	881
<i>Regina v. Surrey, Justices of</i> , 3 D. & L. 343	715
<i>Regina v. Turweston</i> , 16 Q. B. 109	951
<i>Regina v. Tyrwhitt</i> , 2 E. & B. 77	588
<i>Regina v. Westmark, Tithing of</i> , 2 Moo. & R. 305	951
<i>Regina v. West Riding, Justices of</i> , 1 Q. B. 624	72
<i>Regina v. West Riding, Justices of</i> , 2 Q. B. 505	254
<i>Regina v. West Riding, Justices of</i> , 5 Q. B. 1	1025
<i>Regina v. Worcestershire, Justices of</i> , 11 A. & E. 57	229
<i>Reis v. Scottish Equitable Assurance Society</i> , 2 H. & N. 19	465
<i>Reuter v. Electric Telegraph Company</i> , 6 E. & B. 341	204
<i>Rex v. Adames</i> , 4 B. & Ad. 61	32
<i>Rex v. Bell</i> , 7 T. R. 598	515
<i>Rex v. Borron</i> , 3 B. & Ald. 432	549
<i>Rex v. Bridgewater, Trustees of the Duke of</i> , 9 B. & C. 68	59
<i>Rex v. Carlisle</i> , 2 B. & Ad. 362	342

	PAGE
Rex v. Carmarthen, Mayor, &c., of, 1 M. & S. 697	1025
Rex v. Carpenter, 6 A. & E. 794	248, 406
Rex v. Clement, 4 B. & Ald. 218	545
Rex v. Creevey, 1 M. & S. 273	550
Rex v. Denbighshire, Justices of, 4 East 142	1032
Rex v. Devon, Justices of, Note (a) to Rex v. Justices of Kent, 8 B. & C. 640	715
Rex v. Dursley, Churchwardens of, 5 A. & E. 10	384
Rex v. East Teignmouth, 1 B. & Ad. 244	33
Rex v. Fisher, 2 Camp. 563	549
Rex v. Flecknow, 1 Burr. 461	951
Rex v. Fleet, 1 B. & Ald. 379	544
Rex v. Haworth, Chapelwardens of, 12 East 556 }	386
Rex v. Hewes, 3 A. & E. 725	1037
Rex v. Humphery, M'Cl. & Y. 173	365
Rex v. Joddrell, 1 B. & Ad. 403	27
Rex v. Kenilworth, 7 Q. B. 642	682
Rex v. Killminster, 7 C. & P. 228	477
Rex v. Lancashire, Justices of, 12 East 366	250
Rex v. Lee, 5 Esp. 123	544
Rex v. London, City of, 8 How. St. Tr. 1039	122
Rex v. Manchester and Salford Waterworks Company, 1 B. & C. 630	702
Rex v. Maulden, 8 B. & C. 78	384
Rex v. Milnrow, Chapelwardens of, 5 M. & S. 248	857
Rex v. Mitcham, Cald. 276	47
Rex v. Mitchell, 5 T. R. 701	72
Rex v. Morton, 4 M. & S. 48	681
Rex v. Newcomb, 4 T. R. 368	258
Rex v. Norwich, Mayor of, 1 B. & Ad. 310	1025
Rex v. Pedly, 1 A. & E. 822	633
Rex v. Rawden, 2 A. & E. 156	682
Rex v. Rhyddlan, 14 Q. B. 327	239
Rex v. St. Giles, Cambridge, 5 M. & S. 260	951
Rex v. St. Lawrence, Cald. 379	47
Rex v. St. Luke's Hospital, 2 Burr. 1053	47
Rex v. St. Marylebone, 4 D. & R. 475	682
Rex v. Sparrow, 2 Stra. 1123	1025
Rex v. Stafford, Marquis of, 7 East 521	301
Rex v. Stoughton, 2 Saund. 157	951
Rex v. Suffolk, Justices of, 4 A. & E. 319	714
Rex v. Sutton, 3 A. & E. 597	951
Rex v. Tolley, 3 East 467	478
Rex v. Wavell, 1 Doug. 116	384
Rex v. West Riding of Yorkshire, Justices of, 5 T. R. 629	72
Rex v. Willace, 1 East's P. C. 186	478
Rex v. Woking, 4 A. & E. 40	59
Rex v. Wright, 8 T. R. 293	559
Rex v. Wrottesley, 1 B. & Ad. 648	856
Reynolds v. Bridge, 6 E. & B. 528	567
Richards v. Richards, 2 B. & Ad. 447	445
Ridley v. Plymouth Grinding and Baking Company, 2 Exch. 711	204
Rigby v. Hewitt, 5 Exch. 240	725
Roberts v. Read, 16 East 215	636
Roberts v. Smith, 2 H. & N. 213	104
Rodgers v. Nowill, 5 Com. B. 109	653
Rosewell v. Prior, 2 Salk. 460	633

	PAGE
Rowbotham v. Wilson, 6 E. & B. 593	636
Rowbotham v. Wilson, 8 E. & B. 123	636
Royal British Bank v. Turquand, 5 E. & B. 248	199
Royal British Bank v. Turquand, 6 E. & B. 327	199
Royal British Bank, In re, Ex parte Walton, 26 L. J. N. S. Chan. 545	896
Russel's Case, 5 Rep. 27 a	1062
Rustell v. Macquister, Note to Thompson v. Bernard, 1 Camp. 49	350
Ryan v. Shilcock, 7 Exch. 72	945

S.

Sainter v. Ferguson, 7 Com. B. 716	568
Sanders v. St. Neot's Union, 8 Q. B. 810	877
Savile v. Savile, 1 P. Wms. 745	492
Scarfe v. Morgan, 4 M. & W. 270	361
Schmaltz v. Avery, 16 Q. B. 655	934, 1008
Schuster v. McKellar, 7 E. & B. 704	902
Scott v. Richebourg, Count de, 11 Com. B. 447	324
Sea Fire and Life Assurance Company, In re, 2 Sm. & G. 95	201
Seddon v. Tutop, 6 T. R. 607	341
Semayne's Case, 5 Rep. 91 a, 93 a	945
Senhouse v. Christian, 1 T. R. 560	517
Seymour v. Maddox, 16 Q. B. 326	170
Short v. M'Carthy, 3 B. & Ald. 626	633
Shortrede v. Cheek, 1 A. & E. 57	1002
Shortridge v. Bosanquet, 16 Beav. 84	201
Shrewsbury, Earl of, v. Scott, 6 Com. B. N. S. 1, 178	769
Sillem v. Thornton, 3 E. & B. 868	1049
Simons v. Great Western Railway Company, 18 Com. B. 805	969
Simpson v. Lamb, 7 E. & B. 84	812
Simpson v. Robinson, 12 Q. B. 511	349
Sims v. Tufts, 6 C. & P. 207	579
Skipp v. Eastern Counties Railway Company, 9 Exch. 223	104
Sligsby v. Barnard, 1 Rol. R. 430	636
Small v. Gibson, 16 Q. B. 128, 141	1052
Smart v. Morton, 5 E. & B. 30	652
Smart v. Prujean, 6 Ves. 560	1000
Smart v. West Ham Union, 10 Exch. 867	881
Smith v. Hull Glass Company, 11 Com. B. 897	204
Smith v. Neale, 2 Com. B. N. S. 67	994
Smith v. Scott, 2 C. & K. 580	550
South Staffordshire Railway Company v. Burnside, 5 Exch. 129	923
Southcote v. Stanley, 1 H. & N. 247	170
Sparrow v. Harrison, 3 Curt. 16	774
Sparrow v. Sowgate, 1 (W.) Jones 29	771
Spartali v. Benecke, 10 Com. B. 212	912
Stanley v. Jones, 7 Bing. 369	823
Steiner v. Heald, 6 Exch. 607	535
Stevens v. Midland Counties Railway Company, 10 Exch. 352	117
Stoveld v. Hughes, 14 East 308	456
Stray v. Taylor, 2 Com. B. N. S. 197	896
Strutt v. Smith, 1 C., M. & B. 312	150
Sully v. Frean, 10 Exch. 535	150
Sutton v. Clarke, 6 Taunt. 29	642
Swanwick v. Sothorn, 9 A. & E. 895	456

T.

	PAGE
Tait v. Carlisle Local Board of Health, 2 E. & B. 492	702
Tancred v. Allgood, 4 H. & N. 438	821
Tarrant v. Webb, 18 Com. B. 797	104
Tawny's Case, 2 Salk. 531	388
Taylor v. Cole, 3 T. R. 292	815
Taylor v. Stray, 2 Com. B. N. S. 175	896
Taylor v. Whitehead, 2 Doug. 745	951
Teague v. Hubbard, 8 B. & C. 345	444
Thompson v. Hopper, 6 E. & B. 172	1039
Thompson v. Hopper, 6 E. & B. 937	1039
Thompson v. Ingham, 14 Q. B. 710	856
Thornborow v. Whitacre, 2 Ld. Raym. 1164	791
Thornhill v. Hall, 2 Cl. & F. 22	312
Thorogood v. Bryan, 8 Com. B. 115	725
Thrustout dem. Levick v. Coppin, 2 W. Bl. 801	1062
Times Life Assurance Company v. National Alliance Company, Not Reported	322
Tindal, Ex parte, 8 Bing. 402	920
Tinkler v. Wandsworth District Board of Works, 2 De G. & J. 274	425
Toppin v. Field, 4 Q. B. 386	922
Townley v. Crump, 4 A. & E. 58	455
Towns v. Wentworth, 11 Moore's P. C. C. 543	317
Trower v. Chadwick, 13 New Ca. 334	636
Turner v. Davies, 2 Wms. Saund. 150 a	444

V.

Violett v. Sympson, 8 E. & B. 344	653
-----------------------------------	-----

W.

Wain v. Warlters, 5 East 10	980
Walker v. York and North Midland Railway Company, 2 E. & B. 750	968
Wallace v. Kelsall, 7 M. & W. 264	445
Wallington v. Dale, 6 Exch. 284	847
Walmesly v. Cooper, 11 A. & E. 216	444
Walton v. Waterhouse, 2 Wms. Saund. 422	791
Want v. Blunt, 12 East 183	162
Warburg v. Tucker, 5 E. & B. 384	918
Ward v. Audland, 8 Beav. 201	80
Ward v. Audland, 16 M. & W. 862	80
Ward v. Ward, 7 Exch. 838	633
Waters v. Towers, 8 Exch. 401	88
Wharton v. Lewis, 1 C. & P. 529	798
Wheelton v. Hardisty, 8 E. & B. 232	797
Whinfield v. Watkins, 2 Phil. Rep. Ca. E. C. 1	32
White v. Wiltshire, 2 Rol. R. 138. S. C. Palm. 53	939
Whitehouse v. Frost, 12 East 614	456
Wigmore v. Jay, 5 Exch. 354	104
Wild v. Harris, 7 Com. B. 999	766, 802
Wilkinson v. Lloyd, 7 Q. B. 27	896
Williams v. Lloyd, 1 (W.) Jones 179	771
Willis, In re, 4 Exch. 530	923
Wilson v. Hart, 7 Taunt. 295	1008
Winch v. Keeley, 1 T. R. 619	467

TABLE OF CASES CITED.

xxiii

	PAGE
Winterbottom v. Wright, 10 M. & W. 109	903
Wise v. Great Western Railway Company, 1 H. & N. 63	969
Wood v. Downes, 18 Ves. 120	814
Woodhouse v. Herrick, 1 K. & J. 352	303
Woodhouse v. Shepley, 2 Atk. 535	778
Woods v. Reed, 2 M. & W. 777	385
Wordsworth v. Harley, 1 B. & Ad. 391	633
Wright v. Woodgate, 2 C., M. & R. 573	349
Wroughton v. Turtle, 11 M. & W. 561	400
Wyatt v. Harrison, 3 B. & Ad. 871	636
Wyld v. Pickford, 8 M. & W. 443	968

Y.

Yates v. Pym, 6 Taun. 446	911
Young v. Murphy, 3 New Ca. 54	798
Young v. Winter, 16 Com. B. 401	918

CASES
ARGUED AND DETERMINED
QUEEN'S BENCH,
Easter Term,

XXI. VICTORIA. 1858.
Phillips

The Judges who usually sat in Banc in this term, were:

LORD CAMPBELL, C. J.
WIGHTMAN, J.

ERLE, J.
CROMPTON, J.

MEMORANDUM.

In this Term, David Power, Esq., barrister at law, of The Middle Temple, was appointed one of Her Majesty's counsel.

The Reverend THOMAS OLIVER GOODCHILD, Clerk, Appellant, v. The Trustees for maintaining, regulating, and employing the Poor of and within the Parish of St. JOHN at HACKNEY in the county of MIDDLESEX, Respondents.

The Reverend THOMAS DAVIS LAMB, Clerk, *Appellant, v. The Trustees for maintaining, regulating, and employing the Poor of and within the parish of St. JOHN at HACKNEY in the county of MIDDLESEX, Respondents. [*2]

The Reverend THOMAS OLIVER GOODCHILD, Clerk, and The Reverend THOMAS DAVIS LAMB, Clerk, Appellants, v. The Trustees for maintaining, regulating and employing the Poor within the parish of St. JOHN at HACKNEY in the county of MIDDLESEX, Respondents.

The Reverend THOMAS HAWKINS, Clerk, Appellant, and The Churchwardens and Overseers of the parish of LAMBERHURST, in KENT and SUSSEX, Respondents. [Feb. 23.] (a)

(a) This set of cases was omitted in the preceding volume, for want of space.

The owner of a tithe commutation rent-charge, constituted under 6 & 7 W. 4 c. 71, is rateable to the poor in respect thereof, in analogy to the principles established by stat. 6 & 7 W. 4 c. 98. The owner is entitled to deduct the expenses of collection (including law expenses) and losses by non-payment.

He is also entitled to deduct the poor-rate: and it makes no difference, as to this, that, previously to the making of the commutation, the tithes had been compounded for on the principle of the composition being paid free from rates, and that, in making the commutation, allowance had been made for this, under stat. 6 & 7 W. 4, c. 71, s. 37, by increasing the commutation rent-charge accordingly.

The owner is liable, under stat. 18 & 19 Vict. c. 120, s. 161, to a General Rate, and to a Lighting Rate, although, under a previous local Act, the tithe-owner was not liable to a lighting-rate, sect. 165 exempting only land previously exempt; and he is entitled, in the assessment to the poor-rate, to a deduction in respect of both these rates.

But he is not liable to a Sewers-Rate, under sect. 161, the tithes not having been previously rated to the sewers-rate, and sect. 164 being applicable: and he is therefore not entitled, in an assessment to the poor-rate, to any deduction in respect of this.

He is not entitled to a deduction in respect of the Land tax.

He is entitled to a deduction in respect of the tenant's Property tax, Tenths, and Ecclesiastical dues.

If he pays a curate, or a minister of a district chapel, voluntarily, he is not entitled to make any deduction in respect thereof; but, if such payment be legally demandable from him (as where the bishop can insist on the payment of a curate, or in the case of a church building Act), he is entitled to deduct in respect thereof. So he is, if a curate be paid because, owing to the magnitude of the cure, it is impossible for the owner of the rent-charge to discharge the ministerial duties without such assistance. But the owner is not entitled to any deduction in respect of his own personal services.

He is not entitled to deduct sums paid to the Governors of Queen Anne's Bounty in liquidation of interest and part principal of money borrowed by him, under stat. 17 G. 3, c. 53, and 1 & 2 Vict. c. 23, for rebuilding his parsonage-house.

Per Lord Campbell, C. J., Erle and Crompton J., dissentiente Coleridge, J., an additional sum for tenants' profits should be deducted, only if there be any such necessary to induce a tenant, after allowance for collection, bad debts, and law expenses, to take the rent-charge: and this is a question of fact for the Sessions.

The general rule is that the amount must be ascertained as that at which a tenant might reasonably be expected to take the rated property from year to year.

GOODCHILD, Appellant, v. The TRUSTEES, &c., Respondents.

THIS was a case stated for the opinion of this court, by consent of parties, under an order of Coleridge, J., pursuant to stat. 12 & 13 Vict. c. 45, s. 11.

*3] In 1828 the old parish of Saint John at Hackney was divided for certain purposes, but not including the rating for the relief of the poor, into three districts: viz. the parish of Saint John, the parish of South Hackney, and the parish of West Hackney. After the division of the parish, the tithes of the old parish, until the same were commuted under The Tithe Commutation Act (6 & 7 W. 4, c. 71), were divided amongst and received by the incumbents of the three new parishes in certain fixed proportions, according as the same accrued within their respective limits, and continued and were subject to the same rates, charges, and assessments as the same would have been subject to if the same had not been so divided. The tithes payable to the said three incumbents were afterwards commuted for three several tithe commutation rent-charges, payable respectively to the said three incumbents; and which rent-charges became respectively subject to all rates, charges, and assessments in like manner as the said tithes commuted for such rent-charges had been subject before commutation.

The appellant is rector of the new parish of St. John; and the respondents are the Trustees of the Poor acting for the district contained within

the boundaries of the *old parish of St. John, under the provisions of two local Acts of Parliament, viz. 4 G. 3, c. 43,(a) and 50 G. 3, c. cxc.(b) (These Acts formed part of the case.) [*4]

On 23d April, 1856, a poor-rate was made for the old parish of St. John at Hackney by the respondents. It was thus intituled: "A poor-rate or assessment of 16d. in the pound, made, rated, and assessed on Wednesday the 23d day of April, in the year of our Lord 1856, by the Trustees of the Poor of the parish of St. John at Hackney in the county of Middlesex, pursuant to an Act," &c. (50 G. 3, c. cxc.), "and also in pursuance of an Act," &c. (6 & 7 W. 4, c. 96, the Parochial Assessment Act), "upon all and every person and persons who inhabit, hold, or occupy any land, house, shop, warehouse, or other building, tenement and hereditament within the said parish, according to the annual rent or value of all such messuages, shops, warehouses, lands, tenements, and hereditaments, respectively, for the relief, maintenance, lodging, and employment of the poor of the said parish for the current half year, and for the payment of any interest or of any annuities chargeable on the poor-rate of the said parish, or for the repayment of any principal moneys which shall be due from the said parish, and for the discharge of all other expenses of the said parish not provided for by any other Act or Acts of parliament relating to the said parish, for six months commencing on the 25th day of March, 1856."

*In the rate the appellant was thus assessed :

[*5]

	Gross estimated rental.	Ratable value.	Rate at 1s. 4d.
	£	£	£ s. d.
House, stable, and garden	125	110	7 6 8
Tithe commutation rent-charge . . .	940	700	4 ⁶ 1 0(c)

The rate was duly allowed and published.

The appellant made no objection to the assessment in respect of his house, stable, and garden, but appealed to the respondents, under the provisions of the local Act, against the assessment made upon him in respect of his tithe rent-charge as excessive. On 11th November, 1856, they confirmed the rate, dismissing the appeal; and from that decision the appellant appealed to the Middlesex Quarter Sessions, under the powers in that behalf given by the local Acts. Notice of appeal was duly given and served; and the present case is now stated under stat. 12 & 13 Vict. c. 45, s. 11.

The amount for which the tithes payable to the rector of the new parish of St. John's, of which the appellant is rector, were commuted, was 981*l.* 10*s.* This amount is subject to fluctuation, according to the average price of corn, under the provisions of the Tithe Commutation Acts. The amount actually receivable for the year 1856, according to

(a) "For maintaining, regulating, and employing the poor within the parish of St. John at Hackney, in the county of Middlesex; and for lighting the said parish, and establishing a regular nightly watch therein."

(b) Local and personal, public: "To alter, amend, and enlarge the powers of so much of an Act, passed in the fourth year of His present Majesty, as relates to the maintaining, regulating, and employing the poor within the parish of St. John at Hackney, in the county of Middlesex."

(c) *Sic.*

the corn average applicable to the same, was the sum of 92*l.* 13*s.* 9*d.*, payable by half-yearly payments, as provided by the Tithe Commutation Acts.

The appellant, as rector of the present parish of St. John, enjoys other emoluments than the tithe rent-charge; the amount of which is to *6] be ascertained by *agreement between the parties, or in such way as the court shall direct, in case it should be rendered necessary in consequence of the judgment of the court upon this case.

In the three years preceding 1856, expenses were incurred in collecting the said rent-charge, amounting, in the aggregate, to 48*l.* 8*s.* 6*d.*, 48*l.* 2*s.*, and 47*l.* 14*s.*, respectively, showing an average of 48*l.* 1*s.* 6*d.* per annum. Of this average the sum of 4*l.* was the average of law expenses; and the residue was paid to the collector for his time and trouble in getting in the rent-charge by one collection in the year.

An average annual loss of 5*l.* from non-payment has also been suffered by the appellant.

The appellant contends that a tenant, desirous of taking a demise of the rent-charge of St. John at Hackney for the year 1856, would have taken these facts into consideration, and formed an estimate higher than the above average sums of 48*l.* 1*s.* 6*d.* and 5*l.* But (if it shall be the opinion of the court that the appellant is entitled to deductions in respect of losses, law and other expenses, or any of them) it is agreed that, at the time when the poor-rate of April 1856, appealed against, was calculated, the probable expenses of the appellant in collecting and gathering in the said rent-charge in the year 1856, other than law expenses, might on the above facts have been fairly estimated at 44*l.*, and his probable law expenses for the said year in enforcing the payment of the same at 4*l.*, and his probable losses for the same year at 5*l.*

The present parish of St. John at Hackney, of which the appellant was instituted rector in 1839, and of which he still is rector, and which *7] is, as aforesaid, a division of *the ancient parish of St. John at Hackney, contained, in the last Parliamentary census, a population of 14,304 souls.

There is besides the parish church, a district church or chapel situated $1\frac{1}{2}$ miles from the mother church, and built for the use of the parishioners of a district of the said parish, containing 5549 souls. The appellant employs one curate, at a salary of 160*l.* per annum, and also pays 50*l.* towards the support of a minister for the church or chapel before mentioned.

The estimated and usual rates and taxes payable by the appellant for the year 1856, in respect of the said tithe rent-charge, were as follows.

Land tax	£17 10 0
Property tax	46 13 4
Rates (other than the General Rate, Lighting Rate and Sewers Rate, here- inafter mentioned)	87 10 0

In 1856, the appellant was rated in sums respectively amounting to 28*l.* 13*s.* 4*d.*, 26*l.* 5*s.*, and 17*l.* 10*s.*, to the General Rate, Lighting-Rate and Sewers-Rate, in respect of his tithe rent-charge, by an assessment made by virtue of a precept made by the Hackney District Board, under the provisions of stat. 18 & 19 Vict. c. 120. He has appealed

against these rates: and the appeal has, by consent, been referred to the decision of the Court of Queen's Bench on a case stated under the provisions of stat. 12 & 13 Vict. c. 45, s. 11.

If the Court shall decide that the appellant was liable to be rated to the said General Rate, Lighting-Rate, and Sewers-Rate, or any thereof, then it was agreed that such sum or sums as he shall be liable for in respect of the said rates, or any of them, shall also be considered *part of the usual rates and taxes payable by the appellant in [*8 respect of the said tithe rent-charge for the year 1856.

The appellant was liable, as rector, to Ecclesiastical dues for the said year 1856, to the amount of 2*l.*; and to Tenths, to the amount of 2*l.* 12*s.* 6*d.*

The tithes of the said new parish of St. John at Hackney, before commutation, had been compounded for on the principle of the composition being paid free from all rates, charges, and assessments, including poor-rate; and the assistant Commissioner, who presided at the commutation, had regard to that circumstance; and, under the provisions of sect. 37 of The Tithe Commutation Act (6 & 7 W. 4, c. 71), made an addition to the average annual amount of the said compositions. The amount added in respect of poor-rate was based on an average of the poor-rates during the seven years preceding, and was fixed at 3*s.* in the pound per annum. The poor-rate now appealed against is a half-year's rate of 1*s.* 4*d.* in the pound, there being two poor-rates levied in the parish in the year. The poor-rates in the parish have not amounted to 3*s.* in the pound in any year since the said commutation.

The appellant claims to be entitled, in order to arrive at the gross estimated rental of his said rent-charge within the meaning of stat. 6 & 7 W. 4, c. 96, to reduce the gross sum of 92*l.* 13*s.* 9*d.*, the amount receivable for the year 1856, as aforesaid, in respect of the said tithe rent-charge, by the following of the sums above mentioned: viz.,

Estimated losses by non-payment	£5 0 0
Estimated law expenses in enforcing payment	4 0 0
Estimated expenses of collection (other than as above)	44 0 0
Land tax	17 10 0
Property tax	46 13 4
Rates other than General Rate, Lighting-Rate, and Sewers-Rate	87 10 0
General Rate, 28 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> ; Lighting-Rate, 26 <i>l.</i> 5 <i>s.</i> ; and Sewers-Rate, 17 <i>l.</i> 10 <i>s.</i> ; or so much thereof respectively as the appellant is liable to	72 8 4

The appellant also claims to be entitled, in ascertaining the gross estimated rental of his said rent-charge, to a further reduction as above mentioned in respect of the profit which a tenant farming or renting the said rent-charge from year to year would reasonably consider to be an adequate inducement to him to take a demise of such rent-charge from year to year, he having to pay such rent in full, and having to calculate the rent-charges according to such averages in each year, and collect the same by two collections in the year. If the Court shall be of opinion that the appellant is entitled to such last-mentioned reduction, then it is agreed that the sum to be deducted from the gross amount of the rent-charge in respect thereof shall be the sum of 92*l.*

And the appellant also claims to be entitled, for the purpose of ascertaining the rateable value of his said rent-charge within the meaning

of the said Act, or otherwise, to reduce the sum, so to be ascertained as the gross estimated rental thereof, by the following of the above-mentioned sums :

Tenths	£2 12 6
Ecclesiastical dues	2 0 0
Curate's salary	160 0 0

*Amount paid towards the salary of the minister of the district church or chapel 50 0 0

And by a sum for his personal services as officiating minister of the said parish for the year 1856. This sum it is agreed to estimate at 100%, in case the Court shall be of opinion that the appellant is entitled to this reduction.

If the court shall be of opinion that the appellant is entitled to reduce the gross sum so receivable in respect of the said rent-charge for the year 1856 by the sums above mentioned, or any of them, but not in such manner as above claimed by him with respect to the estimation of the gross estimated rental or otherwise, the appellant claims to make such reductions, either before or after ascertaining the gross estimated rental, in accordance with the opinion of the court.

The respondents, besides contending generally that the appellant is not over rated on any of the grounds by him above suggested, or entitled to the deductions above claimed, contend that the deductions claimed by the appellant in respect of tenths, ecclesiastical dues, curate's salary, payment towards minister's salary, and personal services, as above mentioned (if allowable at all), should not be deducted in full from the amount of the tithe rent-charge, but in such proportion only as the tithe rent-charge bears to the whole of the emoluments enjoyed by the appellant as rector.

The question for the opinion of the court is :

Whether, for the purpose of ascertaining the gross estimated rental and rateable value of the said tithe rent-charge, the appellant is entitled to have the gross sum receivable in respect thereof for the year 1856 reduced *by any, and (if any) by which, of the items set out in the case by which he claims to reduce the same.

(Judgment to be entered in conformity with the decision of the Court.)

LAMB, Appellant, v. The TRUSTEES, &c., Respondents.

This was also a case stated for the opinion of this court, by consent of justices, under an order of Coleridge, J., pursuant to stat. 12 & 13 Vict. c. 45, s. 11. It arose upon the same rate which was the subject of the preceding case ; and the statement differed from that of the preceding in the following particulars only.

The appellant is rector of the new church of West Hackney : and he was thus assessed.

	Gross estimated rental.	Rateable value.	Rate at 1s. 4d.
House	£ 60	£ 50	£ s. d. 3 6 8
Field	6	5	6 8
Tithe commutation rent-charge . . .	230	180	12 0 0

He made no objection to the assessment in respect of his house and field, but appealed to the respondents against the assessment in respect of his tithe rent-charge as excessive. The rate was confirmed, and notice of appeal given, as in the preceding case.

The amount for which the tithes payable to the rector of the parish of West Hackney, of which the appellant is rector, were commuted was 256*l.* 3*s.* This amount is subject to fluctuation according to the average *price of corn under the provisions of the Tithe Commutation [*12 Acts. The amount actually receivable for the year 1856, according to the corn averages applicable to the same, was the sum of 240*l.* 10*s.* 10*d.*, payable by half-yearly payments, as provided by the Tithe Commutation Acts.

The case stated, in terms similar to those of the preceding case, that the appellant, as rector, enjoyed other emoluments, to be ascertained by agreement or as the Court should direct.

In the three years preceding 1856, expenses in collecting the said rent-charge were incurred, and losses from non-payment suffered, by him, amounting in the aggregate to 27*l.* 6*s.* 2*d.*, 27*l.* 0*s.* 5*d.*, and 44*l.* 2*s.* 10*d.*, respectively, showing an average of 32*l.* 16*s.* 5½*d.* Of this average the sum of 13*l.* 7*s.* 8½*d.* was the average of losses; and the sum of 7*l.* 0*s.* 5½*d.* was the average of law expenses; and the residue was paid to the collector for his time and trouble in getting in the rent-charge by one collection in the year.

The appellant contends that a tenant desirous of taking a demise of the rent-charge of West Hackney for the year 1856 would have taken these facts into consideration, and formed an estimate higher than the above average sum of 32*l.* 16*s.* 5½*d.* But it is agreed (if it shall be the opinion of the Court that the appellant is entitled to deductions in respect of losses, law and other expenses, or any of them) that, at the time when the poor-rate of April 1856 appealed against was calculated, the probable expenses of the appellant in collecting and gathering in the laid rent-charge in the year 1856, other than law expenses, might on the above facts have been fairly estimated at 12*l.* 10*s.*, and his probable *law expenses for the said year, in enforcing the payment of the same, at the sum of 7*l.*, and his probable losses for the same year [*13 at the sum of 14*l.*

The present parish of West Hackney, of which the appellant was instituted Rector in 1846, contained, at the last parliamentary census, a population of 18,732 souls.

There is, besides the parish church, a chapel of ease, situated one mile and a half from the mother church. The appellant employs a curate at a salary of 105*l.* per annum.

The estimated and usual rates and taxes payable by the appellant for the year 1856, in respect of the said tithe rent-charge, were as follows:

Land tax	£5 5 0
Property tax	12 0 0
Rates (other than the General Rate, Lighting-Rate and Sewers-Rate, hereinafter mentioned)	24 0 0
	<hr/>
	£41 5 0

The case then stated, like the preceding case (*mutatis mutandis*), that in 1856 the appellant was rated at 4*l.* 10*s.*, 3*l.* 15*s.* and 2*l.* 8*s.*, to The General Rate, Lighting-Rate, and Sewers-Rate, respectively, in respect of his tithe rent-charge; and that he had appealed, and the appeal had been referred to this Court under stat. 12 & 13 Vict. c. 45, s. 11. And that, if it should be decided that he was liable to any of these, the sums for which he should be liable should be considered part of the usual rates and taxes payable by him in respect of the tithe rent-charge for 1856.

*14] The appellant paid in 1856, after the making of the said rate, the sum of 10*l.* 16*s.* 6*d.* for First Fruits in respect of the living, to which he was instituted in 1846. The appellant was liable, as rector, to tenths, for the year 1856, to the amount of 1*l.* 0*s.* 6*d.*

The case then stated the principle of the composition of the tithes of West Hackney, as in the former case is stated with respect to the tithes of St. John's.

The appellant claims to be entitled, in order to ascertain the gross estimated rental of his said rent-charge within the meaning of the Parochial Assessment Act, to reduce the gross sum of 24*l.* 10*s.* 10*d.*, the amount receivable for the year 1856, in respect of the said tithe rent-charge, by the following of the sums above mentioned: viz.

Estimated losses by non-payment	£14	0	0
Estimated law expenses in enforcing payment	7	0	0
Estimated expenses of collection (other than law expenses)	12	10	0
Land Tax	5	5	0
Property Tax	12	0	0
Rates other than General Rate, Lighting Rate and Sewers Rate	24	0	0
General Rate 4 <i>l.</i> 10 <i>s.</i> , Lighting Rate 3 <i>l.</i> 15 <i>s.</i> , and Sewers Rate 2 <i>l.</i> 5 <i>s.</i> ; or so much thereof respectively as the appellant is liable to	10	10	0

The case then stated the appellant's claim, as in the preceding case, to a reduction in respect of tenant's profits: and it was agreed that, if he should be so entitled, the amount of the reduction should be 24*l.*

*15] He further claimed to have the assessment reduced as follows:

Tenths	£1	0	6
First Fruits	10	16	6
Curate's Salary	105	0	0

And by a sum for his personal services as officiating minister of the said parish for the year 1856. This sum it was agreed to estimate at 100*l.*, if the court should be of opinion that the appellant is entitled to the reduction.

The case concluded (*mutatis mutandis*) in terms similar to those of the preceding case.

GOODCHILD and LAMB, Appellants, v. THE TRUSTEES, &c.

This was also a case stated for the opinion of this court, by consent of parties, under an order of Coleridge, J., pursuant to stat. 12 & 13 Vict. c. 45, s. 11.

Under the provisions of The Metropolis Local Management Act,

1855 (18 & 19 Vict. c. 120), and in obedience to a precept made on the respondents by the Hackney District Board of Works acting in pursuance of that Act, separate pound rates for the Lighting, Sewers, and General Rates were made by the respondents on the 12th May, 1856.

These rates or assessments were all headed by one general heading in the following words: "Separate pound rates or assessments at 4d., 4d., and 3d. in the pound respectively made, rated, and assessed, on Tuesday the 20th day of May, A. D. 1856, by the Trustees of the *Poor of the Parish of St. John at Hackney, in the county of Middlesex, [16 pursuant to an Act of Parliament made," &c. (50 G. 3, c. cxc.(a)), also in pursuance of an Act," &c. (6 & 7 W. 4, c. 96, the Parochial Assessment Act), "and also in pursuance of an Act," &c. (18 & 19 Vict. c. 120, "For the better local management of the Metropolis"), "upon all and every person and persons who inhabit, hold, or occupy any land, house, shop, warehouse, or other building, tenement and hereditaments, within the said parish, according to the annual rent or value of all such messuages, shops, warehouses, lands, tenements, and hereditaments, respectively, for the sewerage and drainage, and the paving, cleansing, lighting, and improvements within the said parish, in pursuance of a certain call, precept, or demand made upon the said Trustees of the Poor of the Parish of St. John at Hackney, by the Hackney District Board of Works. Dated the 20th day of May, 1856."

In the rate the appellants were assessed as follows.

No.	Name of occupier.	Description of property.	Gross estimated rental.	Rateable value.	General Rate.	Lighting Rate.	Sewers Rate.
					Rate at 4d. in the pound.	Rate at 4d. in the pound.	Rate at 3d. in the pound.
466	Goodechild, Rev. Thos. House, stable Oliver and garden . .		£	£	£ s. d.	£ s. d.	£ s. d.
			125	110	1 16 8	1 16 8	1 7 6
		Tithe commutation rent-charge . . .	940	700	11 13 4	11 13 4	8 15 0
2656	Lamb, Rev. Thos. Davis House		60	50	16 8	16 8	12 6
		Field	6	5	1 8	1 8	1 3
		Tithe commutation rent-charge . . .	230	180	3 0 0	3 0 0	2 5 0

*The sums which are named in the columns headed "Gross estimated Rental," and "Net rateable value," respectively, are taken [17 from the then last poor-rate, which was made on the parish, on 23d of April, 1856, and against which poor-rate the appellants in this case have respectively appealed, as being excessive. The three rates, with reference to which the present case is stated, were duly allowed and published.

(a) Ante, p. 4.

The appellants appealed to the respondents, under the provisions of The Metropolis Local Management Act, 18 & 19 Vict. c. 120, and two local Acts, (a) 4 G. 3, c. 43, and 50 G. 3, c. cxc., which regulate the appointment of the respondents as trustees of the poor for the parish of St. John at Hackney.

The respondents entertained the appeal, but dismissed the same, confirming the rates. From this decision the appellants appealed to the Middlesex quarter sessions. Notices of appeal were duly given and served: and the present case is stated for the opinion of the Court of Queen's Bench under stat. 12 & 13 Vict. c. 45, s. 11. (It was agreed that the local Acts before referred to should accompany and form part of this case.)

In 1828 the old parish of St. John at Hackney was divided, for certain purposes, but not including the rating for the relief of the poor, into three districts: viz. the parish of St. John, the parish of South Hackney, and the parish of West Hackney. The tithes of the original parish were, on its division into three parishes, apportioned amongst the incumbents of those parishes in certain proportions, but retained in the hands of such incumbents all the liabilities and incidents to which *18] they were subject when united in the hands of the *rectors of the original undivided parish. The appellant, The Reverend T. O. Goodchild, is rector of the new parish of St. John; and the appellant, The Reverend Thomas Davis Lamb, is rector of the parish of West Hackney.

The tithes of the new parish of St. John were, in the year 1842, commuted, under the Tithe Commutation Act, (b) at 981*l.* 10*s.*; and the tithes of the parish of West Hackney were, on the 23d day of February, 1843, commuted, under the said Act, at 256*l.* 3*s.*

1. With regard to the Sewers-Rate.

The tithes commuted for the said rent-charges respectively were never, before the division of the old parish above mentioned, assessed to Sewers-Rate. After the division of the said parish, neither the tithes, nor the tithe commutation rent-charges for which the tithes were commuted, were ever, until October, 1850, assessed to Sewers-Rate. In that month the tithe rent-charges of the appellants were respectively, for the first time, rated to Sewers-Rate by the commissioners under the first commission issued after the passing of the General Sewer Act, 11 & 12 Vict. c. 112. The rates so imposed were paid by the present appellants under protest.

The commission issued on 1st January, 1849.

At and previously to that time, it was not the practice of the then existing commissions or Commissioners of Sewers, whose jurisdiction extended over the sewerage districts including the parishes of which the appellants are respectively incumbents, to assess tithes or tithe rent-charge to the Sewers-Rate.

In or about 1852, one of the present appellants, the Rev. Thomas Davis *19] Lamb, being assessed to the *Sewers-Rate in respect of the tithe commutation rent-charge, appealed to the Metropolitan Commissioners of Sewers, appointed and acting under the provisions of stat. 11 & 12 Vict. c. 112, last referred to, against the assessment. The case was argued before them; and they decided in favour of the appellant. (The

case stated the announcement of this decision to the appellant: the respondents objected to the statement of the appeal being introduced. On this nothing eventually turned.)

The tithes of the new parish of St. John at Hackney, and of West Hackney, before commutation, had been compounded for on the principle of the compositions being paid free from all rates, charges, and assessments; and compositions been paid on that principle; and the assistant commissioner, who presided at the commutation, having regard to that circumstance, under the provisions of the 37th section of the Tithe Commutation Act (amongst other additions for rates and assessments) made, on account of such Sewer-Rate, an addition of 2d. in the pound to the average annual amount of the said compositions payable in the said parishes of St. John and West Hackney, as an equivalent.

The Sewers-Rate levied in the original parish of St. John at Hackney, both before and after its division, was, before the passing of The Metropolis Local Management Act, 18 & 19 Vict. c. 120 (except as to a small portion), imposed on the said parish as a district by itself for the purpose of maintaining the then existing watercourses and sewers according to the general laws then in force relating to sewers.

The rate now appealed against is imposed, for the purposes authorized by stat. 18 & 19 Vict. c. 120, on the area comprised within the original parish of Hackney, *as part of the Hackney District; which, as defined by that Act, comprises the original parish of St. John at Hackney, and also the parish of St. Mary Stoke Newington. [*20

2dly. As regards the Lighting-Rate.

Previously to the passing of the Metropolis Local Management Act (18 & 19 Vict. c. 120), the appellants never were assessed to the Lighting-Rate in respect of their tithe commutation rent-charge. Neither were the tithes, for which the rent-charges were commuted, ever assessed to lighting-rates. The parish was lighted under the provisions of the local Acts before referred to. (a)

3dly. With respect to the General Rate.

The appellants, before the coming into operation of stat. 18 & 19 Vict. c. 120 (which provides by the General Rate, amongst other things, for the objects of the former highway-rate), were respectively rated to the Highway-Rate in respect of the said tithes and tithe rent-charges.

The respondents, besides contending that the appellants were liable to the said Sewers-Rate, Lighting-Rate, and General Rate, respectively, and were duly assessed, contend that, if the appellants or either of them were entitled to exemption from all or any of the said rates, or to a reduction of the amounts assessed, their proper remedy was not by appeal to the respondents, as before mentioned, or to the Quarter Sessions, and that the *respondents and the Quarter Sessions respectively had no jurisdiction over or with respect to the said rates. [*21

The questions for the opinion of the court are:

1. Whether the respondents had jurisdiction, under the provisions of the said Acts or otherwise, to entertain the said appeals.

(a) By stat. 4 G. 3, c. 43, s. 10, the trustees were empowered to make a "rate or assessment for lighting the said parish, and maintaining a nightly watch in the same, which last-mentioned rate shall be raised by way of pound rate, not exceeding in any one year one shilling and three-pence in the pound upon and according to the annual or improved rent or value of all houses, shops, warehouses, coach-houses, stables, and other buildings within the said parish."

2. In case the court shall be of opinion that the respondents had such jurisdiction, whether the appellants, or either of them, are liable to be rated to the said Sewers-Rate in respect of their tithe commutation rent-charges, and, if so, to what proportion (if any) less than the whole of their net annual value.

3. Whether the appellants (both or either of them) are liable to be rated to the said Lighting-Rate in respect to their said rent-charges.

4. Whether the appellants (both or either of them) are liable to be rated to the said General Rate in respect of their said rent-charges.

It is agreed that, if the court shall decide that the appellants or either of them are liable to be rated to the said several rates or any of them, the amounts at which the appellants respectively shall be rateable in respect of such rates or rate shall be ascertained by the decision of the court upon two cases respectively stated and now pending for the opinion of the court as to the amount at which the appellants respectively are rateable for the relief of the poor in respect of the said tithe rent-charges.

(Judgment to be entered at the Quarter Sessions in conformity with the decision of the court.)

***22] *HAWKINS, Appellant, v. The Churchwardens and Overseers of LAMBERHURST, Respondents.**

This was a case stated by consent of parties, and order of Wightman, J., under stat. 12 & 13 Vict. c. 45, s. 11, for the opinion of this court.

The appellant is vicar, and the respondents are churchwardens and overseers, of the poor, of the parish of Lamberhurst, in the counties of Kent and Sussex.

On 3d February, 1857, a poor-rate was made for the said parish of Lamberhurst. It was thus intituled:

“An assessment for the relief of the poor of the parish of Lamberhurst, in the counties of Kent and Sussex, and for other purposes chargeable thereon, according to law, made this 3d day of February, A. D. 1857, after the rate of 8d. in the pound.”

In the rate the appellant was thus assessed.

	Gross estimated rental.	Rateable value.	Rate at 8d.
	£ s. d.	£ s. d.	£ s. d.
Glebe house	40 0 0	32 0 0	1 1 4
Land	5 0 0	4 0 0	0 2 8
Vicarial tithe rent-charge	625 0 0	460 0 0	15 6 8

The rate was duly allowed and published.

On the 6th and 7th of March last the appellant duly served on the respondents notice of his intention to appeal against the said rate, as excessive, at the Easter Quarter Sessions to be holden at Maidstone. The present case is now stated under stat. 12 & 13 Vict. c. 45, s. 11.

***23]** *The tithes of the parish of Lamberhurst were commuted, under the Tithe Commutation Act, 6 & 7 W. 4, c. 71, for a rent-charge payable in lieu of such tithes. It is agreed that the gross sum

payable in respect of this rent-charge for the year 1857 shall be taken to be 625*l*.

In estimating the rateable value of the said rent-charge at 460*l*., the respondents took into consideration, and made allowances (by way of deduction from the said sum of 625*l*.) in respect of, ecclesiastical dues, and tenths, poor-rate, highway-rate, expenses of collecting, and probable loss in collecting the rent-charge, and also for the profit which they considered would be sufficient to induce a solvent tenant to take a demise of the rent-charge: but they refused to allow, and contended that they ought not to make any allowance or reduction, in respect of Land tax, Property tax, Payments to the Governors of Queen Anne's Bounty, or for the personal services of the appellant as officiating minister of the parish of Lamberhurst as hereinafter mentioned. The correctness of the amounts of the reductions which the respondents allowed as above mentioned is, for the purpose of the present inquiry, admitted.

The appellant contends: 1st, that the respondents should not have taken as "gross estimated rental" the said gross sum receivable by him in respect of his rent-charge, but the said sum of 460*l*.

He also contends that, for the purpose of ascertaining the rateable value of his said rent-charge, the respondents should have further reduced the said amount of 460*l*. by the sums of 8*l*. 12*s*. and 25*l*. 17*s*. 5*d*., payable by him for the year 1857, in respect of his said rent-charge, for Land tax and Property tax respectively, and by a further sum in respect of the sums payable by him in *the said year to the Governors of Queen Anne's Bounty as hereinafter mentioned. [*24

In 1843, the vicarage-house of Lamberhurst (in the said assessment called the Glebe-house) having become so ruinous and decayed that one year's net income of the said vicarage would not have been sufficient to rebuild or put the same, with the necessary offices, into sufficient repair, it was (under the provisions of the Acts of Parliament after mentioned) certificated by a surveyor, duly appointed by the ordinary to examine the same, to be unfit for the residence of the incumbent of the benefice. Thereupon, under the provisions of stat. 17 G. 3, c. 53, and of stat. 1 & 2 Vict. c. 23, the appellants obtained the consent of the ordinary of the diocese and the patrons of the church and living to borrow and take up at interest (in the manner provided by the said Acts) the sum of 1200*l*., to be laid out and expended in rebuilding the said vicarage-house and other necessary offices upon the glebe, belonging to the said church and living. This sum was advanced by the Governors of Queen Anne's Bounty, in accordance with the said Acts of Parliament: and, by an indenture made 3d February 1843, between the appellant, as vicar of Lamberhurst, of the one part, and the Governors of Queen Anne's Bounty, of the other part, in the form given by the schedule to stat. 17 G. 3, c. 53, the appellant granted, by way of mortgage, all the tithes and profits of his vicarage to the said governors as a security. By that indenture the appellant covenanted to pay interest at the rate of 3½ per cent. per annum on the said sum of 1200*l*., or so much as, at the end of each year, should be due, and to repay the principal by instalments of 1-30th part thereof in each year. The indenture (as in *the form contained in the schedule aforesaid) contained a proviso for avoidance of the said indenture on payment of the said princi- [*25

pal sum and interest by the appellant and his successors in manner aforesaid.

The amount payable under the said indenture for the year 1857 will be 65*l.* 4*s.*, being 25*l.* 4*s.* for interest and 40*l.* for an instalment of principal.

The appellant resides in the said vicarage-house. No regard has hitherto been had to these payments to the Governors of Queen Anne's Bounty in estimating the annual rateable value either of the said vicarage house or rent-charge.

The appellant also contends that a further reduction should have been made in respect of his services and personal labour, as officiating minister of the parish of Lamberhurst. The parish of Lamberhurst contained, at the last Parliamentary census, a population of 1734 souls. And it is agreed that, if the court shall be of opinion that any reduction should be made in respect of such services and labour, the amount of such reduction shall, for the purpose of this case, be taken at 150*l.*, being such a sum as, under the provisions of stat. 1 & 2 Vict. c. 106, the bishop is authorized to appoint by way of stipend to a curate for any benefice and parish of like value and population with the said vicarage and parish of Lamberhurst in the event of non-residence of the incumbent, and upon other events specified by the said Act.

The appellant claims to make these reductions, which have not been allowed by the respondents, if the court shall think they ought to have been allowed, either before or after the gross estimated rental shall have been ascertained, according as the court shall decide.

*26] *The questions for the opinion of the court are:

1. Whether the gross estimated rental of the said tithe rent-charge should (according to the contention of the respondents) be taken at the said sum of 625*l.*, or (according to that of the appellant) at the said sum of 460*l.*

2. Whether, in ascertaining the rateable value of the said tithe rent-charge or of the glebe-house, the respondents should make an allowance in respect of Property tax, Land tax, Payments to the Governors of Queen Anne's Bounty, and for the appellant's services as officiating minister of Lamberhurst, or for any of the said matters.

(Judgment to be entered in conformity with the decision of the court.)

The case of *Goodchild v. The Trustees, &c.* (antè, p. 2) was argued in Michaelmas Term, 1857.(a)

Hugh Hill, for the respondents.—The circumstance that, under stat. 6 & 7 W. 4, c. 71, s. 37, the tithe commutation rent-charge was increased to 3*s.* for the express purpose of covering the rates, charges, and assessments, including poor-rates, which have never since amounted to so much as the 3*s.*, ought to be taken into account in estimating the deductions to which the owner of the rent-charge is entitled. The general principle upon which the assessment is to be made appears from *Regina v. Capel*, 12 A. & E. 382 (E. C. L. R. vol. 40). And in *Lumley's Law of Parochial Assessments*, p. 31,(b) the mode of applying the principle *to tithes is explained. The owner is to be

*27] rated upon an estimate of the net annual value. This is to be ascertained by discovering what the tithe rent-charge would let for;

(a) November 14th, 1857. Before Lord Campbell, C. J., Coleridge and Wightman, J.

(b) See 4th ed., p. 45.

that is, what would be given if it was let to a tenant: and this, of course, is measured by the value of the occupation to him, because he would not give, as rent, the whole value of the rent-charge, but only so much as would be equivalent to what went into his own pocket. A tenant would deduct from the gross profits a compensation for his risk and trouble; for he would not take the subject of occupation so as to incur risk and apply labour gratuitously. Hence the losses by non-payment, expenses of enforcing payment, and expenses of collection, are proper deductions. So are those entitled "other rates." The Land tax and the Property tax are paid by the landlord, not the tenant: for those, therefore, no deduction is allowable. The General Rate, Lighting-Rate, and Sewers-Rate must be allowed for, if they are to be paid at all by the owner of the rent-charge, which question will be decided in the case of *Goodchild and Lamb*, post, p. 34. The Poor Law Commissioners have certainly expressed an opinion that the Ecclesiastical dues ought to be deducted; *Lumley's Law of Parochial Assessments*, p. 37 (4th ed., p. 48); and the same remarks would probably apply to the Tenth. But for the curate's salary there can be no deduction; nor for the personal labour of the owner of the rent-charge. That was decided in *Rex v. Joddrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20). The salary of the curate, as far as the case shows, is paid voluntarily; it is merely a mode in which the owner of the rent-charge expends his profits. [Lord CAMPBELL, C. J.—May *not that be necessary, in order to entitle the incumbent to take the profits?] That does not appear. So, [*28 again, the personal exertions of the incumbent himself may be more or less without reference to the amount of profits: it is a mere question of moral responsibility. Nor can these outgoings be connected especially with this particular branch of profit: they would be referred also to the other profits of the incumbency, such as fees.]

Sir *F. Kelly*, contrà.—The best mode of determining these questions is to conceive the rent-charge let, as it might be under a sequestration, and to consider what rent the lessee would give: that is, what deductions he would make from the gross annual income. [Lord CAMPBELL, C. J.—Should it not be a lessee who takes upon himself the incumbent's duties?] Such a lessee would clearly lower his offer of rent in consideration of the lease imposing so much duty upon him. [Lord CAMPBELL, C. J.—According to that view, if what remained after the outgoings was no more than a fair compensation for the lessee's trouble, there would be no rate, or only a nominal one.] Why should there be, upon such a supposition, more than a nominal rate? The lessee would, in effect, get nothing by the occupation. The proviso, in sect. 1 of stat. 6 & 7 W. 4, c. 96, seems, so far as the present question is concerned, to leave the law as the body of the section would leave it. [COLERIDGE, J.—The proviso was perhaps introduced with reference to stat. 43 Eliz. c. 2, s. 1.] As a matter of historical fact, it was inserted to protect the clergy. The deductions for which the owner of the rent-charge here contends will be found to be all in conformity with the *principles [*29 laid down in *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18 (E. C. L. R. vol. 45). There the Court, in its judgment, said, p. 40: "There is a fallacy in confounding that which the lease gives a legal title to, and that which it gives the lessee the means of doing

or enjoying. No two things can be more distinguishable: and it is the latter which regulates the rent a tenant will give, and not the former." Then as to the deductions which the respondents dispute. The question as to the Land tax was discussed in *Rex v. Joddrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20). [COLERIDGE, J.—That was a case before stat. 6 & 7 W. 4, c. 96: what was decided was, that the owner of the rent-charge should be rated equally with the other parishioners; and that, therefore, if they paid the Land tax without being allowed for it by their landlords, and paid the rents specified also, on which they were rated, he ought also to be rated on so much only as remained after payment of the Land tax; but that, if the landlords allowed the Land tax out of the specified rents, then the owner of the rent-charge ought to pay on his rent-charge without any deduction for Land tax.] If the owner of the rent-charge be not allowed to deduct the Land tax, he will, in effect, be paying upon a larger revenue than he receives. The same argument applies to the deduction claimed in respect to Property tax. The deduction for tenant's profits must be allowed, as it always has been, independently of the mere interest of money, because no one would take a lease which simply repaid his outlay; and that would be the case of a lease where the rent was so large as to leave no profit to the tenant. Then as to the payment of the curate. [Lord CAMPBELL, *30] C. J.—We are to assume *that the employment of the curate is proper.] That is enough for the appellant's case. It is true that, if the incumbent has emoluments independently of the rent-charge, the deduction cannot be made in respect of the rent-charge exclusively: but, the curate being paid for as a necessary condition of the incumbency, that payment, to that extent, diminishes the value of the incumbency. Under the 77th, 78th, and other sections of stat. 1 & 2 Vict. c. 106, an incumbent is frequently compelled to employ and pay a curate. As to the chapel, a tenant would have to submit to this outgoing. Then something should be allowed for the work and labour of the incumbent. If he did not perform this himself, he would be obliged to pay another for performing it. Probably the deduction ought not to exceed the smallest sum for which he could procure the service.

Hugh Hill, in reply.—Sect. 69 of stat. 6 & 7 W. 4, c. 71, enacts "that every rent-charge payable as aforesaid instead of tithes shall be subject to all Parliamentary, parochial, and county and other rates, charges, and assessments in like manner as the tithes commuted for such rent-charge have heretofore been subject." Then the proper deductions are only those mentioned in the Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 1, the object of which enactment was to put an end to such questions as the present. The Land tax is not among such deductions. The tenant's profits are to be allowed; but they have been sufficiently allowed for under the head of expenses of collection, which corresponds to the trouble for which a tenant expects to be remunerated. The salary of the curate, so far as appears here, is not an outgoing *31] necessary to enable the incumbent to receive *the rent-charge: it arises merely from the incumbent's personal infirmity. The facts respecting the chapel are imperfectly stated: if the payment be gratuitous on the part of the incumbent, it is expenditure by him, not a deduction from his income. The proviso in stat. 6 & 7 W. 4, c. 96, has

been adverted to: the Bench, in *Regina v. Capel*, 12 A. & E. 382, 411 (E. C. L. R. vol. 40), seems to have treated it as scarcely intelligible.

Cur. adv. vult.

The case of *Lamb against The Trustees, &c.* (antè, p. 11), was argued on the same day.(a)

Hugh Hill, for the respondents.—Most of the questions raised in this case are identical, except as to amounts, with those in the preceding. The First Fruits cannot now be claimed as a deduction; otherwise the parishioners of 1856 will have to bear a loss in respect of what should have been taken into account in 1846. And, as to the minister's salary, there is here, as in the preceding case, an absence of facts showing that this was a necessary payment.

F. M. White, contrà.—The deduction in respect of the First Fruits might certainly have been made in the year in which they became due. No difference can arise, in the computation of the proper deductions, from the circumstance that the commutation has been placed at 3s. higher than the original composition on the ground that the original composition was paid free from rates; *the rates will now have to be paid by the owner of the commutation rent-charge. [Lord CAMPBELL, C. J.—We agree that this circumstance makes no difference.] The Parochial Assessment Act introduced no new principle, but only affirmed the law as it had been previously settled; *Regina v. Lumsdaine*, 10 A. & E. 157 (E. C. L. R. vol. 37); and this law was held to apply to tithes, in *Regina v. Capel*, 12 A. & E. 382 (E. C. L. R. vol. 40). The value of the occupation being lessened in consequence of the occupier having to pay Land tax, Property tax, the General Rate, the Lighting-Rate, and the Sewers-Rate, in respect of such occupation, deductions ought to be made for all these, as was decided, in the case of a sewers-rate, in *Rex v. Adames*, 4 B. & Ad. 61 (E. C. L. R. vol. 24). It is a fallacy to suppose that the tenant's profits are covered by allowing for the expense of collection: no one would take a lease unless, after paying the expense of collection, he was a gainer. *Rex v. Joddrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20), appears to be an authority against allowing for the personal services of the incumbent. But the decision is there put on an unsatisfactory ground. It is said that the services are personal only; but the poor-rate itself is a personal rate, in respect of the land. [Lord CAMPBELL, C. J.—In respect of the rent-charge more than of the glebe?] No; in respect of the two. Unless the duty be efficiently performed, the bishop may compel the incumbent to pay a curate. A sequestrator would also have to do so: *Hubbard v. Beckford*, 1 Hag. Con. R. 307; *Whinfield v. Watkins*, 2 Phil. Rep. Ca. E. C. 1.

Cur. adv. vult.

*The case of *Hawkins against The Churchwardens, &c.*, of [33 *Lamberhurst* (antè, p. 22), was argued the same day.(b)

Manisty, for the respondents.—The points common to this and the preceding cases need not be reargued. As to the mortgage to the Governors of Queen Anne's Bounty, it is difficult to see how this is to be connected with the rent-charge. The appellant is assessed to the poor-rate personally in respect of his rent-charge: but how can he say that the interest on a mortgage created simply in respect of the vicarage-house is an outgoing from the profits of the rent-charge? But, even

(a) November 14th, 1857. Before Lord Campbell, C. J., Coleridge and Wightman, Js.

as respects the vicarage-house and glebe, the interest on the mortgage is no more a subject of deduction than the interest on a mortgage made by an ordinary lessee of land.

Bovill, contra.—The Land tax is a parochial tax: *Rex v. East Teignmouth*, 1 B. & Ad. 244. As to the Property tax, the tenant may deduct from his rent the Property tax which is due from the landlord: but, if he omit to do so, he cannot recover it from the landlord. He pays it, in the first instance, as occupier. Then as to the mortgage to the Governors of Queen Anne's Bounty. The injustice of not allowing the deduction appears from this: that the occupier will not only be rated on profits which he cannot take, but will also be rated more highly in proportion as the house is improved by the outlay of the money *34] borrowed. [Lord CAMPBELL, C. J.—Are the *parishioners to be more highly rated because the incumbent spends a part of his income in building a house?] If the house were allowed to fall down they would suffer in the same way. But the deduction is allowable on this plain principle. The incumbent, by the act of the Legislature, is compelled to give up this part of his income, incidentally to his possession of the preferment: a lessee would get only the residue of the income, and would require an abatement of the rent accordingly. How can the case differ from that of repairs? The allowance for the sewers-rate, *Rex v. Adames*, 4 B. & Ad. 61 (E. C. L. R. vol. 24), rests on a similar principle; and so does the allowance for ecclesiastical dues: *Rex v. Joddrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20). As to the performance of the duty, it is an expenditure of money's worth, incidental to the occupation, as much as the payment of a substitute would be. [COLERIDGE, J.—If an observer were to be rated for the observatory in which he dwells, could he make a deduction in respect of the labour of observing?] In *Regina v. Southampton Dock Company*, 14 Q. B. 587 (E. C. L. R. vol. 68), a deduction was allowed for the personal services of the directors. [Lord CAMPBELL, C. J.—Those services were bestowed upon the subject-matter in respect of which the rate was imposed.]

Manisty was heard in reply.

Cur. adv. vult.

The case of *Goodchild and Lamb against The Trustees, &c.* (antè, p. 15), was argued on the same day.(a)

*35] *Hugh Hill*, for the respondents.—The objection as to the jurisdiction is abandoned. The question as to these rates arises under The Metropolitan Management Act, 18 & 19 Vict. c. 120, s. 161. That enacts that the three rates "shall be levied on the persons and in respect of the property by law rateable to the relief of the poor in the respective parishes, and shall be assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor." But it is said that, as to the Sewers-Rate, this enactment is controlled by sect. 164, which provides: "that where any property was at the time of the issuing of the first commission under the said Act of the eleventh and twelfth years of Her Majesty, chapter one hundred and twelve, entitled to exemption from or to any reduction or allowance in respect of the sewers-rate, such exemption, reduction, or allowance shall be observed and allowed in levying any sewers-rate under this Act." It is contended that this exemption applies here, because the rent-charges were not in fact previously rated to the Sewers-Rate. But

(a) November 14th, 1857. Before Lord Campbell, C. J., Coleridge and Wightman, J.

the exemption points, not, to a mere omission to rate in fact, but to a legal exemption: and none such is shown. Besides, the rent-charge has been increased, on the ground that the tithes were compounded for free from the rates, under sect. 37 of stat. 6 & 7 W. 4, c. 71. [Lord CAMPBELL, C. J.—I cannot see how the rent-charge is benefited by the sewerage: the tithes themselves may have been so.] It is true that in *Metropolitan Board of Works v. Vauxhall Bridge Company*, 7 E. & B. 964 (E. C. L. R. vol. 90), an extrajudicial opinion was expressed by this Court that the sewers-rate should be made, taking into *account [36 the benefit. As to the Lighting-Rate, it is sought to infer an exemption from the language of sect. 165, which is supposed to assume that the Lighting-Rate will be only on “the owners and occupiers of houses, buildings, and property, other than land,” which, it is said, excludes incorporeal hereditaments. But the incorporeal hereditaments come within the description of property other than land. No exemption can be shown in respect of the General Rate.

F. M. White, *contra*.—As to the Sewers-Rate, sect. 164 clearly relates to exemptions in fact; for it refers to the rates leviable by the commissioners under stat. 11 & 12 Vict. c. 112; and sect. 76 of that Act provides “that where in any separate sewerage district any property is by law or by the practice of the existing commissions or commissioners of sewers entitled to exemption, wholly or partially, from, or to any reduction or allowance in respect of the Sewers-Rate, the commissioners shall in making the District Sewers-Rate observe and allow such exemption, reduction, or allowance.” But, further, the rent-charge was legally exempt, as deriving no benefit: *Metropolitan Board of Works v. Vauxhall Bridge Company*, 7 E. & B. 964 (E. C. L. R. vol. 90). There is authority that the tithe itself was not rateable; *Collis*, Reading upon the Statute of Sewers 132, comes to the conclusion that the parson was not to be assessed for his tithes: and this is adopted in *Com. Dig. Sewers* (E. 5). In *Woolrych’s Treatise on the Law of Sewers*, ch. 11. p. 88 (2d ed.), the law is similarly laid down. (a) Lord Coke, in 2 Inst. 640, appears to recognise the doctrine that tithes in spiritual hands are not to be *contributory to temporal charges. Such a [37 principle may have been latterly broken in upon: but it is important as showing how the law stood at the time of the old Statutes of Sewers, 6 H. 6, c. 5, and 23 H. 8, c. 5. As to the Lighting-Rate, sect. 10 of stat. 4 G. 3, c. xliii., confined the rate to buildings. (b) In *Howell v. London Dock Company*, 8 E. & B. 212, 230 (E. C. L. R. vol. 92), the court said that the general purview of stat. 18 & 19 Vict. c. 120, “is directed more to a change in the power of administration than to a change in the liability of property to be rated: and the presumption is strong against any great change of liability having been intended.” Besides, sect. 165 of stat. 18 & 19 Vict. c. 120, provides that, where a parish is rated for lighting under any other Act which wholly exempts any land, such land shall be wholly exempted still. These arguments certainly apply with less strength to the General Rate: still, as that is laid for sanitary purposes, which are wholly inapplicable to a rent-charge, the general principle of benefit applies.

Hugh Hill was heard in reply.

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the court.

(a) The word “not” appears to be accidentally omitted in p. 88, line 7. (b) *Ante*, p. 20.

GOODCHILD, Appellant, v. The TRUSTEES, &c., Respondents.

This is a case stated for the opinion of the court under stat. 12 & 13 Vict. c. 45. The appellant is the *rector of the new parish of St. John, Hackney, and, as such, entitled to a certain tithe commutation rent-charge: the parish is, for the purposes of the relief of the poor, still within the boundaries, and a portion of the old parish of St. John, Hackney: and the respondents are, by the local Act, the proper authority to make the poor-rate, which they have done, including within it the appellant in respect of his glebe-house, glebe and tithe commutation rent-charge. No objection is made to the rate in respect of the two former: but the appellant claims to have deductions made from the rate in respect of the latter, on several specified grounds, which it will be necessary to consider in detail: and, although some of these were conceded in the argument, and on some of them the court has already intimated its opinion, yet the decision of the case will probably be so general in its application that it will be better to state the general principles on which incumbents are to be rated in respect of their tithe rent-charge, and to express our opinion on each item of deduction claimed.

It would seem hardly necessary to say that in our consideration of these points we must be regulated by the decided cases: that it is not an open question whether the tithe rent-charge in the hands of a spiritual incumbent makes him rateable at all in respect thereof, under the statute of Elizabeth, nor whether the mode and measure of rating shall be regulated by The Parochial Assessment Act of 6 & 7 W. 4, c. 96. We are aware of ingenious theories on the first of these points; which, however, have been at all events started too late to influence our decision: and we are aware also of practical difficulties in the application of stat. 6 & 7 W. 4, c. 96; which we must deal with as well as we can, as we *have been compelled to do in respect of railways and other sub-
 *39] ject-matters not perhaps directly contemplated by the Legislature when the Act was framed. Of the two leading cases on the subject, *Rex v. Jodrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20), and *Regina v. Capel*, 12 A. & E. 382 (E. C. L. R. vol. 40), the former preceded the Parochial Assessment Act, the latter came after it. In the former case, when no statute had prescribed the form of the poor-rate, the court decided, in accordance with numberless authorities, that the governing principle was equality in proportion of the rate in respect of all species of rateable property in the parish. There the tithes had been extinguished; and the rector received a corn-rent in lieu thereof, which was payable by the occupiers and tenants of the land; the tenants were rated on the rack-rent: but the rack-rent is necessarily only a part of the total annual profit; and all beyond that part escaped the rate: but the rector was rated on the gross amount of his corn-rent, deducting only the poor-rate itself: and the Sessions were directed by the Court to ascertain what proportion the rack-rent bore to the whole annual profit, and to rate the rector in a sum which bore the same proportion to his gross corn-rent. The same principle was applied to the land tax. And thus far the case might seem to be of less general application now; for it did not decide how far, a priori and independently of local circumstances, this or that item formed part of the rateable value, but only

equalized the incidence of that particular rate on the tenants and the rector. But the court, in its judgment, went beyond this, and decided that ecclesiastical dues ought to be deducted, "because they are payable by the" rector "in *respect of his rectory, and the profits of the rectory constitute the only fund out of which they can be paid;" [*40 and that "the expenses of providing for the duties of the incumbency ought not to be deducted, because those duties are personal, and ought to be performed personally by the incumbent."

In *Regina v. Capel*, 12 A. & E. 382 (E. C. L. R. vol. 40), there had been no commutation; but the appellant, who was the vicar of the parish receiving composition for his small tithes, was rated on such a proportion of the gross annual amount as was found to be equal to the rent or yearly sum at which his "small tithes might reasonably be expected to let for from year to year, free of all usual tenants' rates and taxes, and deducting from such rent a yearly sum, the amount of the ecclesiastical dues." This was obviously a rate made under the Parochial Assessment Act, and at all events in formal compliance with it. And the Court decides that this Act must be applied to the rating of tithes, either received in kind, or by composition; that the form of the rate in question was correct; and the assessment itself on the *finding in the case* free from objection. To this extent the judgment is certainly correct: and, if the matter were before us now for the first time, we should be compelled to come to the same conclusions. But it is clear that the language of the judgment is in some respects not easily reconcilable with that in *Rex v. Joddrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20), and openly at variance with some of the observations made in the course of it: and it may well be doubted whether it did full justice to the appellant under the particular circumstances, or established that substantial equality between the *tithe-owner and occupier of land which yet [*41 it admits to be the true object of every rule on the subject.

This, however, is not a material inquiry now; for the judgment expressly leaves every case to be decided according to its circumstances; so that the particular application of what it determines to be the true rule shall not work injustice to the tithe-owner. "If any case," it is said, "shall arise in which the facts show that the rule, though formally applied according to the statute, will work injustice to the tithe-owner, there will be no more difficulty in relieving him than in relieving one landowner as against another." The practical conclusion then to be drawn from this, which has now for many years been the governing case, seems to be this: that, in rating the tithe-owner, the Parochial Assessment Act must be complied with; but, as the language of the Act is literally applicable, if all its particulars be looked to, only to corporeal hereditaments, it is necessary in the assessment of the tithe-owner to proceed by analogy, which analogy must be as large and liberal as is necessary to effectuate substantial equality in the assessment, and at the same time compatible with the maintenance of the principle.

It is obvious that, of the allowances and deductions specified in the 1st section of the Act, some such as "tithe commutation rent-charge," "repairs," "insurance," are wholly inapplicable to the case of a rate on the tithe-owner as such. It is certain, also, that the tithe-owner, as such, is commonly subject to other charges and outgoings, which have no existence with regard to land, and yet fall within the same principle

as those specified in the Act, when the object is to get at that net value *12] which must be the subject of the rate. *If, therefore, the statute applies to a rate on the tithe-owner, and if equality among all the contributors to the rate must be pursued, both which propositions are incontestable, it is only by considering the deductions and allowances specified in the Act as instances applicable to one great class of property, and not as a complete enumeration of all, and by applying these analogically to other classes, that the statute can have its proper effect given to it.

What then, in the case of a tithe commutation rent-charge, are the rates and taxes from which the rent on a supposed demise of it is to be free, and what expenses are to be deducted from it in order to bring out the rateable amount? This is the question which we now have to decide: and it may perhaps be a convenient form of answering the question to take the items claimed by the appellants in the order in which they were put forward by their counsel, and express our opinion on them seriatim. Many of these were conceded by the respondents' counsel; and others will create no difficulty.

Thus, the expenses of collecting the rent-charge, including therein law expenses to enforce payment, and losses by ultimate non-payment, are clearly such as a tenant must take into account, and as would reduce the amount of rent which he would be prepared to give: they are such, also, as the tithe-owner himself, occupying as it were his own rent-charge, must almost necessarily incur.

The poor-rate itself is clearly a tenant's rate; nor was it disputed that, under ordinary circumstances, it was to be allowed. But the case finds that the tithe composition in this parish had been calculated before *13] the *commutation was made, on the principle of its being paid free from (among other rates) the poor-rate, and that the assistant commissioner had had regard to that circumstance in fixing the amount of the rent-charge, making an addition in respect of this to such amount. This, however, was not done in virtue of any compact between the tithe-owner and parishioners, which might make it inequitable in him to demand now an allowance of the rate from the amount of his assessment, but under the provisions of sect. 37 of The Tithe Commutation Act, 6 & 7 Vict. c. 71. These provisions are general and imperative: the value of the tithes is to be estimated, without making any deduction on account of any parliamentary, parochial, county, and other rates, charges, and assessments to which the said tithes are liable: and, whenever the tithes have been demised or compounded for on the principle of the rent or composition being paid free from these, regard shall be had to the circumstance, and such an addition be made on account thereof as shall be an equivalent. This provision appears to us not to affect the present question: the object of it was that the full gross value of the tithes should be ascertained antecedent to the charges, parliamentary or otherwise, to which they might be liable, which might vary from time to time; some of which might be landlords' taxes, some tenants'; and, this being ascertained, to fix an exact equivalent for it. The usages in particular parishes might in some make it necessary to make an addition to the actual payments in order to arrive at this: but, when arrived at, either with or without the addition, the clause leaves the liability to the several taxes and rates, and the consequent allowances

to be made on assessments, to be determined by *the general law. We think, therefore, that the amount of the poor-rate ought to [*44 be deducted in this as it would be generally.

A claim is next made in respect of three several rates, called the General Rate, Lighting-Rate, and Sewers-Rate.

The appellant has appealed against these rates on the ground of non-liability. This appeal is before us in a separate case: and it is agreed, in this case, that, if we should think the appellant liable, then they shall be considered part of the usual rates and taxes payable by the appellant in respect of the tithe rent-charge, and be deducted from the rate.

It is necessary, therefore, to consider this question: and, first, we are of opinion that the appellant is liable to the General Rate. This is a rate imposed under stat. 18 & 19 Vict. c. 120, s. 161; it is imposed to meet the expenses of carrying that Act into execution, other than those covered by the Sewers-Rate and Lighting-Rate; it is to be levied on the persons and in respect of the property by law rateable to the relief of the poor. *Primâ facie*, the appellant and the tithe rent-charge fall under this description; and no ground of exemption is stated in the case.

Secondly, the question in regard to the Lighting-Rate is of more complexity. It is imposed, by the same 161st section, on the same persons and in respect of the same property. There is, therefore, the same *primâ facie* liability. Before the passing of this Act, the Lighting-Rate was imposed, under the local Act, 4 G. 3, c. 43, upon "houses, shops, warehouses, coach-houses, stables, and other buildings:" of course the tithe-owner was not rateable as such; and that he was not rated then can have no effect on his rateability now. By sect. 165 of *stat. 18 & 19 Vict. c. 120, any *land* which under any previous [*45 Act was exempt from the Lighting-Rate shall continue exempt: but, even if *tithes* could be considered as then *exempt* merely because they did not fall within the enacting words of stat. 4 G. 3, still they are not *land*; and to this word no larger meaning than its own is given by the interpretation clause, sect. 250, of stat. 18 & 19 Vict. 120. And there are reasons to be found in the context for confining its meaning to what it ordinarily imports. Seeing that incorporeal hereditaments were not before rated, and that even under this Act, by sect. 165, the proportion of the rate is varied as between the occupiers of houses and buildings and the occupiers of mere land, which seems to point to the actual benefit received as being the foundation and measure of the rate, seeing too that both as to this rate, by sect. 165, and the Sewers-Rate, by sect. 164, all former statutable exemptions are preserved, it may perhaps be thought that the legislature did not intend to impose this rate on the owners of incorporeal hereditaments. But we do not know how to get over the clear words of sect. 161, which make liability to the poor-rate the criterion. We think, therefore, that the appellants are liable to this rate.

Thirdly, the Sewers-Rate remains: and to this, imposed, by the same sect. 161, on the same persons and in respect of the same property, there is the same *primâ facie* liability. But we think this is distinctly answered by sect. 164, the language of which is much stronger than that of sect. 165. By this it is provided that, where *any property* was at the time of issuing the first commission under stat. 11 & 12 Vict. c.

112, entitled to exemption from the Sewers-Rate, such exemption shall *46] be observed in laying any Sewers-Rate under this Act. No Sewers-Rate had ever been imposed on the tithes before commutation. On an appeal to the Metropolitan Sewers Commissioners against a sewers-rate on the rent-charge, the appellant was relieved; and both the practice before and the decision under this Act were fully warranted from a consideration of the nature of the property and the principle which regulates the imposition of the Sewers-Rate, namely, that of actual benefit received by the property rated.

We understand it to have been conceded that, if we should hold the appellants liable to all or any of these three rates, they were to be allowed as tenant's rates. We have, however, thought it right to consider generally the propriety of this concession, with a view to other cases in which the question might arise. We think that the Lighting and General Rates, being in all respects put on the same footing as the poor-rate, must be considered as tenant's rates incident to the occupation; that the appellant's liability is referable to a quasi occupation of the rent-charge; and therefore that they fall within the category of tenant's rates in the 1st section of the Parochial Assessment Act.

The next claim to be considered is that in respect of the Land tax. In *Rex v. Joddrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20), the same question arose, and was answered by a reference to the usage in the particular parish. If the tenants deducted the Land tax first paid by them out of their rents, then the landlord really paid it, and no allowance could be made for it to the appellant: if not, then, with a view to equality *47] between him and the occupiers of land, he was to be allowed it. But the question cannot now be answered in the same way; for all variety arising from different usages in parishes is intended to be done away with by the Parochial Assessment Act; and the allowance cannot be made for it unless it be brought within the term "usual tenant's rates and taxes."

Whether, in strictness, the Land tax be a landlord's or tenant's tax may be doubtful. In *Rex v. Mitcham*, Cald. 276, and *Rex v. St. Lawrence*, Cald. 379, Lord Mansfield and the Court of King's Bench held it to be *with respect to the public* a tenant's tax: but this is not inconsistent with what the same great judge said in *Rex v. St. Luke's Hospital*, 2 Burr. 1053, 1063: "The Land tax differs from the poor's tax. The landlord who receives the rent, is to pay the Land tax: but the poor's tax is payable by the occupiers." By stat. 38 G. 3, c. 5, s. 17, the tenant is *required and authorized* to pay the sum rated upon the land, and to deduct out of the rent so much of the rate as in respect of the rent the landlord should and ought to pay and bear; and the landlords, both mediate and immediate, according to their respective interests, are required to allow such deductions on receipt of the residue of the rents. It has been held that a covenant that the tenant should pay the land tax is not unlawful: but, apart from any special agreement to the contrary, the tenant, though primarily charged, is allowed (and, as *Dallas, C. J.*, held in *Andrew v. Hancock*, 1 B. & B. 37, 43 (E. C. L. R. vol. 5), is required) by the Act to deduct it from the rent. Hence it is commonly considered a landlord's tax, and does not seem to fall within the words "*usual tenant's rates and taxes*," a form of expression

in the statute seemingly introduced for the *purpose of letting in [*48 other considerations than those of a strictly legal character.

We do not think that this allowance ought to be made to the appellant.

For what is called the tenant's Property tax he is certainly entitled to an allowance; nor can any question be made as to Tenths and other ecclesiastical dues, if any, of the same character. But, as First Fruits and Tenths are calculated on the whole annui proventus, and not on the tithes only, the allowance in respect of the rate on the rent-charge must only be in the proportion which this bears to the whole annui proventus: this, however, will only affect the present rate, as in a future year a proportionate deduction would have to be made from the rate on the glebe.

We are now arrived at the three concluding claims, which are all of the same general nature, though there are material distinctions between them, on which perhaps our decision may turn.

Mr. Goodchild is stated to be the rector of a parish containing, in the last parliamentary census, a population of 14,304 souls. Besides the parish church is a district church or chapel, built for the use of a district in the parish containing above 5000 souls. He employs one curate at a salary of 160*l.* per annum; and he also pays 50*l.* a year towards the support of the minister of this district church or chapel. Under these circumstances, he claims to be allowed, under the head of expenses, first, for the 50*l.*; secondly, for the curate's salary; and, thirdly, 100*l.* for his personal services as the officiating minister of the parish.

We intimated, in the course of the argument, that the facts found as to the payment of the 50*l.* were not *sufficient to enable us to give [*49 an unconditional answer to the question raised. The case does not disclose the character of the payment. If Mr. Goodchild voluntarily contributes this sum towards the maintenance of a clergyman for the district, and may, if he pleases, withdraw it, however laudable the contribution may be, he can no more claim any allowance in respect of it than he could for any portion of his income which he devotes to charitable purposes. On the other hand, this chapel may have been built, and a district set apart, under some one of the many Acts of Parliament which have been passed with a view to church extension; and by Mr. Goodchild himself, or one of his predecessors, a certain amount of the rent-charge may have been virtually separated from the residue as part of the endowment. In such case, though he may with one hand receive the 50*l.*, yet he may be bound to pay it with the other, so that, in substance, it is not his. And, quite apart from the provisions of the statute, he ought not to be rated for it; for it is not beneficially in his occupation, any more than if it had been a portion of the glebe which he had given up for the same purpose. If any one would be rateable for this it would be, not Mr. Goodchild, but the minister of the district church. It does not appear to us that this minister can be considered one of Mr. Goodchild's stipendiary curates consistently with the statement.

These remarks may suffice to direct the respondents as to the allowance or non-allowance of this sum.

It may be convenient to consider the last of the remaining claims
E., B. & E.—4

first, that in respect of personal services. The appellant likens himself to the tenant of a farm, who, being his own bailiff, and devoting to its *cultivation that personal skill and labour which he might employ at a profit elsewhere, claims to be allowed for the value of such skill and labour, as in substance an outlay or expense necessary to maintain the farm in a state to command the rent by which the rate is to be measured. In substance this claim was made and rejected in *Rex v. Joddrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20): but the decision there is not an authority here, because the claim now stands on the statute, which was not under consideration in that case. We have stated that, in order to do justice between the parties in cases like the present, the statute can only be made applicable by allowing a large and liberal analogy to prevail in the interpretation. If we were required to draw the terms of the proportion into strict accordance, it ought to have been held that the statute did not apply to the case of a tithe rent-charge at all, because, if so interpreted, the tithe-owner would be placed in a different condition from every other rate-payer, and not be allowed deductions the same in principle to those allowed to every other occupier. Still we must find this sameness in principle before we allow the deduction: and we are unable to do that in regard to this claim. The expenses to be deducted are described as being such as are necessary to maintain the farm in a state to command the rent: the skill and labour of the farmer certainly are necessary to maintain the farm in that state, or their equivalent purchased by money from others; if so devoted in kind, they have a right to be represented in their money value by the application of skill and labour; the rateable subject-matter is maintained or increased. But nothing like this subsists between the *personal labour of the incumbent and the tithe rent-charge: the former is a duty growing out of the institution to the cure of souls; the latter is a property, the right to which accrues by induction to the temporalities; and they have no necessary relation in amount the one to the other. There may be great labour required as a duty and a small endowment: there may be a very large endowment, and very small it may be even no labour imposed as a duty: the greatest amount of piety, learning, and devotion to pastoral duties will not increase the amount of the rent-charge, the greatest neglect of them will not diminish it.

We do not mean to say that no relation of any kind subsists between the pastoral duty and the endowment of the benefice; nor do we doubt that tithes were intended to be a maintenance both to enable the incumbent to withdraw from temporal labours and live in the discharge of his duties to his parishioners, and also, in some sort, a temporal reward for that devotion of himself to those duties. But it is not a relation of the same kind as that between the farmer's labour and the productiveness of his farm: there is nothing in it like cause and effect. And we think we should both lower the estimation and endanger the position of the clergy if we were to hold the contrary, as we certainly should most materially alter the character of their duties. If two men become incumbents to-day of two benefices, the one of 100*l.* a year, the other of 1000*l.* a year, each undertakes, under an equally binding responsibility, to devote his whole time and attention, skill and intellect to the cure of souls appertaining to his incumbency: and it may be that more is necessary in the former than the latter: but, if the view of the appel-

lants were taken, it might *be that the former was only bound to do what was equivalent to his remuneration; and in times of [*52 change it might be suggested, as to the latter, that a large portion of his income ought to be taken from him, and perhaps all, if he became unable to discharge the duties of his cure better. The truth is that the incumbent cannot measure by any money standard his personal services, or the fruits of them in the spiritual improvement of his parishioners. The personal labours of the incumbent are not a charge on the tithes, but on his personal conscience; and in a matter of poor-rate are simply out of the question.

Then does this reasoning dispose also of the claim in respect of the curate's salary? In so far as the curate is merely a substitute for the incumbent, we think it does so. Where the clergyman is non-resident, or, being resident, from sickness, infirmity, or any less creditable cause does not perform his own duty personally, but employs another person instead, all that has been just now said seems to apply. But the application of a principle must depend on circumstances: and a more difficult question arises where, as in the present case, from the vast size or population of the parish, one man's labour is entirely insufficient for the duties necessarily to be discharged by the incumbent. In some cases of this kind modern legislation has intervened (see stat. 1 & 2 Vict. c. 106), and authorized the bishop to require the appointment of a stipendiary curate, or, in the case of non-residence, even of two; it has also enabled him to require two, under some circumstances, see stat. 58 G. 3, c. 45,(a) three, services to be celebrated on Sundays in the parish churches: and all these interferences are authorized and regulated with relation to *the value of the incumbency and the number of the [*53 population, establishing therefore, in such cases, a proportion between the labour required and the remuneration bestowed. Now, if, under any of these provisions, a clergyman, devoting all his time and attention heartily to the discharge of his duty, were called on to appoint and pay a curate, it seems to us that he could scarcely be said to be doing by a deputy that duty which he had undertaken to do personally; he is still doing all that in his own person; but he is employing an assistant to do something more, and paying for that assistance out of the subject-matter in respect of which he is rated: and the law has established a relation between the two. In such a case, it seems to us that the salary of the curate ought to be deducted from the amount on which the rate is to be laid. But, if a clergyman, where the need of a curate is as great as that in which the bishop is authorized to interfere, but the bishop cannot, because the number of the population or the value of the incumbency is below the requisite amount, from a sense of duty appoints a curate, he himself still devoting all his own time and attention to his cure, or if another clergyman, under circumstances which would entitle the bishop to interfere, does not wait for his interference, but from his own sense of the need does that voluntarily which in his default the bishop might compel him to do, can it be said that in either of these cases there is any difference of principle from the one before stated? It would be strange if a different rule was applicable.

We think that, in regard to stipendiary curates, the legislature has now declared, if not created, a duty, which calls even on the most

devoted and vigorous incumbent not to limit his exertions to his own individual strength, when the population of his parish requires, and
 *54] *the amount of his rent-charge enables him to pay for, assistance ; and that a relation, therefore, in such circumstances and to such an extent, is established between the labour to be done and the fund which is to enable the doing it. If the bishop may by law take so much from the tithe rent-charge and apply it to the payment of a curate that another service may be performed or pastoral duties be discharged which were necessarily left undone before, and if the proper effect of such withdrawal is to make the amount so withdrawn no longer assessable on the rate on the incumbent, any more than if it were appropriated to the maintenance of the minister of a district chapel in the parish, the same consequences follow when, under circumstances the same in substance, the incumbent does not wait to be compelled ; for the bishop's power is given only because the thing ought to be done ; and the duties of the cure, without any personal neglect of the incumbent, must be left unperformed unless it be done.

As a general rule, therefore, we think that, under such circumstances as we have stated, the reasonable stipend of the curate or curates ought to be deducted from the rate. The application of this in particular parishes must be for the parish officers and the justices. In the present case there can be no doubt, where the population, after the deduction which we understand is to be made for the district church, amounts to about 10,000, that the assistance of one curate at least is absolutely necessary to insure anything approaching to an adequate discharge of the pastoral duties : and therefore that the salary should be allowed for.

We have now gone through the several claims ; and the rate will be amended according to the principles we have laid down.

*55] *GOODCHILD and LAMB, Appellants, v. THE TRUSTEES, &c., Respondents.

These are appeals in respect of the General Rate, Lighting-Rate, and Sewers-Rate, which we disposed of in the course of our judgment in the case of Goodchild v. The Trustees, &c.

LAMB, Appellant, v. THE TRUSTEES, &c., Respondents.

This case raises the same points in principle which we have already disposed of in the case of Mr. Goodchild. The circumstances under which the appellant has a curate do not appear : but the parish officers must apply the principles which we have laid down for their guidance. This application is a matter of fact for them in the first instance, and the Court of appeal afterwards, if necessary ; and not for us.

The judgment must be entered accordingly.

HAWKINS, Appellant, v. The Churchwardens and Overseers of LAMBERHURST, Respondents.

The only new point in this case is a claim by the appellant to have deducted from the rateable value of his benefice a sum which he pays annually to the Governors of Queen Anne's Bounty, in liquidation of the interest, and part liquidation of the principal, of a sum of money

borrowed by him under stats. 17 G. 3, c. 53, and 1 & 2 Vict. c. 23, for the rebuilding of his *parsonage-house. To entitle himself to this, he must bring his cure within the letter or the spirit of stat. 6 & 7 W. 4, c. 96: that does allow a deduction of the "probable average annual cost of the repairs," to which he would be certainly entitled; but we see no ground for admitting the present claim. If a landowner rebuilds his mansion, the expense may swallow up more than the whole income of the estate for the year; but his estate does not thereby become not rateable. And the estate is not the less productive, nor does he the less receive the income, because he expends that and more in building a new house on it. And so, if before these statutes passed the incumbent rebuilt, as many did, his parsonage out of his own means, he must still have been rateable for his tithes. So, again, if the landowner had borrowed the money on the security of his estate, he could not have claimed to deduct the interest, or any portion of principal which he might repay under agreement for his poor-rate, even if he were tenant for life only. The incumbent who borrows from Queen Anne's Bounty and mortgages his tithes under the statute is in exactly the same situation. The claim clearly must be disallowed.

The Court having, in the preceding cases, pronounced no opinion on the question of tenants' profits, that part of the case of the Hackney Tithe Commutation Rent-Charge was again argued in Trinity Term, 1858.(a)

Bovill, for the appellants.—The appellants are entitled to a deduction, on account of tenant's profits, in addition *to the deductions already allowed in respect of law expenses and of expenses of collection. Stat. 6 & 7 W. 4, c. 96, substituted one uniform mode of rating for the uncertain and variable modes upon which property had been formerly rated for the relief of the poor, by providing that all rates should be made upon the net annual value of the property. The question then is, what is "the net annual value" of this rent-charge? It is clear that, in all cases, the value of the property is more than the sum which, if the property were let, the tenant would pay for rent; for otherwise the tenant would not take the property, as he would make nothing by it. The profit is, of course, variable; but it has been agreed that, in the present case, it shall be taken at about ten per cent.: and the only question for the Court is, Whether any deduction in respect of this item is to be allowed. A tithe rent-charge is a peculiar kind of property, and one which the owner would generally prefer to let. In many cases the rent-charge is let at a sum below its actual amount, evidently upon the principle of deducting from that amount a sum for tenant's profits, so as to offer some inducement to take the property. [ERLE, J.—What would you let 1000*l.* in the funds for? Would you make a deduction on account of the trouble of applying for the dividend at the Bank?] The case is hardly analogous; but the test there would still be the same, namely, what could a person to whom it was let afford to give for it, so as to allow himself a reasonable profit? [ERLE, J.—Here a deduction has already been allowed for the expense of collecting.] The deductions already allowed merely protect the tenant from loss; they do not leave him any margin for profits. [CROMPTON, J.—But you admit

(a) June 7th. Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

*58] that the rent-charge has been *reduced to a net sum by the deductions already made. Are you not, in fact, claiming these deductions a second time in a different form?] No; what is now claimed is a deduction, not in respect of expenses incidental to the property, but in respect of so much of the annual amount as represents what is made by the tenant as profits. [ERLE, J.—Surely the person letting is not to be expected to give a bonus to the tenant for taking. The usual allowances made, in calculating a rent, the rent of a farm for instance, are for the interest on capital, and for the time and skill expended by the tenant upon the property. You contend that a deduction for profit is to be allowed in addition to these. Have you any authority for such a claim?] In *Rex v. Joddrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20), (which was decided before the passing of 6 & 7 W. 4, c. 96, but which is nevertheless an authority so far as regards the proper test for ascertaining the rateable value of the property to be rated), the court recognise the distinction between the full annual value, which includes both landlords' and tenants' profits, and the rent or rateable value, which is such annual value less the tenant's profits and all outgoings incidental to the tenure of the property. [CROMPTON, J.—But are not the tenant's profits here included in the deductions already made?] No; in *Goodchild v. The Trustees, &c.*, it is expressly found that they amount to 92*l.*, a larger sum than the aggregate of the other deductions for law expenses, expenses of collecting, and losses by non-payment. [Lord CAMPBELL, C. J.—*Rex v. Joddrell* is no authority for the deduction of tenant's profits *in addition* to the other deductions allowed here.] In *Regina v. Capel*, 12 A. & E. 382, 414 (E. C. L. R. vol. 40), which was decided after the passing of stat. 6 & 7 W. 4, c. 96, the Court *59] *takes the same distinction as in *Rex v. Joddrell*, between the net annual value, that is to say, the rent which may be commanded for the occupation, after allowing for all outgoings and tenant's profits, and the gross annual value of the property. In *Rex v. Woking*, 4 A. & E. 40 (E. C. L. R. vol. 31), *Rex v. The Trustees of the Duke of Bridgewater*, 9 B. & C. 68 (E. C. L. R. vol. 17), and *Regina v. The London and South Western Railway Company*, 1 Q. B. 558 (E. C. L. R. vol. 41), a deduction for tenant's profits was held good upon the same principle.

Manisty, for the respondents.—The appellants are not entitled to these further deductions, which have already been allowed for in the deductions already made for expenses of collection, &c. The position of the holder of a rent-charge is not the same as that of a farmer: the former undergoes no risk, expends no capital, and has very little personal trouble. All that has to be deducted from the annual amount of a rent-charge, in order to induce a tenant to take it, is the amount of actual loss and actual outgoing: the difference represents the rent at which it would let. In every calculation of this kind the particular subject-matter must be looked at: the net value in the present case is arrived at easily, and is clearly not diminishable by the addition of the 10 per cent. which the appellants claim. [COLERIDGE, J.—If the owner himself held the rent-charge, would you not have to deduct something for his time and trouble, for the withdrawal of his labour from other matters, as it was put in *Regina v. Capel*, 12 A. & E. 415 (E. C. L. R. vol. 40)?] The Court there declined to hold that there was any difference between

the position of the owner and that of the occupier. But, *in the present case, the time and trouble of either owner or occupier are [*60 fully allowed for in the deductions already made. *Cur. adv. vult.*

CROMPTON, J., now delivered the judgment of the Court.

In these cases the question was as to the application of the Parochial Assessment Act to the case of a clergyman entitled to a rent-charge in lieu of tithes, and the allowances to be made to the clergyman in assessing such property.

We were asked whether, *in addition* to the allowances to which he had been held entitled on a former occasion, he was entitled to "a further reduction" "in respect of the profit which a tenant farming or renting the said rent-charge from year to year would reasonably consider to be an adequate inducement to him to take a demise of such rent-charge from year to year, he having to pay such rent in full, and having to calculate the rent-charges according to" the corn "averages in each year, and collect the same by two collections in the year."

The deductions allowed on the preceding argument included allowances for all expenses of collecting, for all bad debts, commission, and law expenses; and it is now sought, *in addition*, to claim a sum by way of tenant's profits, found in the case to be ten per cent.

We find it impossible to say that the tithe-owner is *necessarily* entitled to any such deduction *in addition* to the deductions formerly allowed.

The Parochial Assessment Act must be applied to this as well as to all other cases of the same kind: and the test imposed by that statute is the amount which *a tenant might reasonably be expected to [*61 give after the allowances mentioned in the Act.

The words "tenants' profits" are not found in the Act; but in the common case of farms, in the taking of which the tenant naturally looks to the profits of successful agriculture as the recompense of his outlay and labour, such a sum may properly be included. In the case of a railway also, or other similar concern, the party taking would look to the profit to be made in carrying on the concern.

In cases where the sum is fixed at a certain amount, no profits of the kind alluded to can be expected or exist; and we must look to what would be the real inducement to a tenant to take a demise of the rent-charge. Where the amount is certain to be paid, a moderate compensation for the trouble of getting in the money, with what would be the far allowance to meet expenses and contingent losses, would be the inducement to a tenant to take. In such case, where he made a profit by his labour as collector, that alone might be a sufficient inducement if he were guaranteed against bad debts and law expenses. It is difficult to see in such a case why a man might not take the tenancy on the same terms, or nearly so, as the collection.

By the statute the assessment ought to be at what the tenant might reasonably be expected to take for. And, if the allowance for collection would not be enough in addition to the allowance against bad debts and law expenses, the tithe-owner would be entitled to the further deduction; but in a case like the present we should think that the sum necessary to induce a tenant to take, in addition to the allowance for expenses of collecting, for bad debts and for law expenses, would be, if not altogether an evanescent quantity, at most a very small sum.

*62] *The principle, therefore, on which we think the assessment should be made is, that the rent-charge is to be assessed, like all other property, according to what it might reasonably be expected to let from year to year; and, in deciding upon such amount, the nature of the property is to be regarded. And it is to be considered whether a profit can be looked to or expected, as in the case of farms: and whether, in each particular case, anything over the expenses for collecting and the allowances for bad debts and law expenses would be necessary to induce a tenant to take.

In each particular case of the kind this question must be for the persons making the rate, and for the sessions on appeal.

It may be that a tenant might willingly take in some cases for less than the amount which, in addition to an allowance for collection, would secure him positively against all risk of bad debts and law expenses, as the profit of collection itself might be sufficiently remunerative to the party taking, and the other losses might be treated as contingent.

It may be that in other cases persons would hesitate to take with the allowances referred to without something additional in the way of profits. And we think that this is a question of fact to be determined according to the circumstances of each particular case, the rule in every case being that the amount must be ascertained as that at which a tenant might reasonably be expected to take from year to year.

My brother Coleridge, who formed part of the court when these cases were argued, has seen this judgment, and wishes us to state that he does not approve of it.

Judgment for the respondents.

*63] *JONES v. THOMPSON. April 17.

The garnishee clauses in The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 60, 67), apply only where there is an existing debt due from the garnishee to the judgment-debtor, though the time of payment may be postponed. Therefore this court refused a rule to attach the amount for which the judgment-debtor had obtained a verdict against a third person in an action for unliquidated damages, no judgment having been yet signed, and the amount therefore not being a debt.

In this case the plaintiff had obtained judgment.

Prentice now moved for a rule under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 61), to attach in the hands of a third person the amount for which the judgment-debtor had recovered in an action against him. From his statement it appeared that the action against the intended garnishee was one for unliquidated damages: a verdict had been recovered by the judgment-debtor, but no judgment had been signed: and the only point was whether this was a debt within the meaning of the section.

Prentice.—The Common Law Procedure Act, 1854, sect. 61, authorizes an attachment of all debts “owing or accruing” from the garnishee to the judgment-debtor. Here there was no debt so long as the amount of damages was uncertain; but the verdict has ascertained the amount. It is true that it is not yet a debt due and owing, and therefore could not be a petitioning creditor’s debt, as was decided in *Ex parte Charles*, 14 East 197; but it is accruing, according to the decision in *Langford v. Ellis*, 14 East 202, note (b). [CROMPTON, J.—Lord Ellenborough, in

Buss v. Gilbert, 2 M. & S. 70 (E. C. L. R. vol. 28), says that *Langford v. Ellis* was overturned in *Ex parte Charles*. I myself, at Chambers, have always acted *on the supposition that the garnishee clauses [*64 apply only to cases in which there is an existing debt, though it may be only accruing. On that principle I have refused to make orders attaching rent before it became due, and instalments of an annuity not yet due, because they were not yet debts.]

WIGHTMAN, J.—The principle established in *Ex parte Charles* was that unliquidated damages were not a debt till judgment. Now sect. 61 empowers us, if the judgment-creditor shows “that any other person is indebted to the judgment-debtor,” to attach “all debts owing or accruing from such third person.” Mr. *Prentice* relies on the words “or accruing:” but I think that these words are intended to apply to those cases in which there is debitum in presenti solvendum in futuro. I think that, to bring the case within the statute, there must be a debt, though it need not be yet due.

CROMPTON, J.—I am of the same opinion. There must, under this Act, be a debt as much as in bankruptcy. I do not agree that the use of the word “accruing” makes a distinction on this point; there must be a debt, though it may be not yet due: and so there would be, therefore, if there were a bankruptcy provable under rebate. I have always acted on the principle that it is not enough to show that it is very probable that there soon will be a debt, but that it must be shown that there is a debt, though it need not be yet due.

(No other Judge was present.)

Rule refused.

*LOUIS STEIN and ADOLPHE STEIN *v.* MAURICE VALKENHUYSEN. *April 17.* [*65]

A creditor, by a concerted fraud, induced his debtor, who resided abroad, to come to England, and immediately had him arrested by order of a Judge. The facts being made to appear by affidavit, this Court, by rule, set aside the whole, as an abuse of the process of the Court.

H. HAWKINS moved on behalf of the defendant, who had been arrested, to discharge him from custody. It was arranged that cause should be shown against his rule, if obtained, in the first instance.

It appeared by the affidavits that the defendant Valkenhuysen was a foreigner, and that the plaintiffs' cause of action against him arose in Belgium. Valkenhuysen, being a merchant domiciled in Paris, was declared a bankrupt under the French law, and obtained from the Tribunal of Commerce of the Department of the Seine a protection against arrest by his creditors for three months from the 24th March. This being the state of things, he received from a Mr. Smith, of London, a letter proposing to employ him as agent in Paris for certain patentees. The affidavits set out the correspondence, in the course of which Mr. Smith suggested plausible grounds rendering a personal interview between Valkenhuysen and one of the patentees desirable, and appointed a meeting at a particular hotel in London. Valkenhuysen arrived there accordingly, and was almost immediately arrested under a *capias* issued in this cause by order of Pollock, C. B. The affidavits of the defendant deposed to his belief that the whole of Smith's correspondence was a mere

trick concerted, between Smith and the plaintiffs and their attorney, to lure the defendant to England in order *that he might be arrested; *66] and, though the plaintiffs' attorney made an affidavit in answer denying any collusion on his part, neither of the plaintiffs nor Smith made any affidavit.

H. Hawkins, for his rule.—Stat. 1 & 2 Vict. c. 110, s. 3, does not entitle a plaintiff to a *capias* as a matter of right, whenever his debtor is within England and about to quit it; the statute leaves the Court a discretion to grant or refuse it; *Hitchcock v. Hunter*, 5 Jurist 770; and, if there be a discretion under any circumstances, the Court will exercise it in favour of a defendant under such circumstances as these. A rule *Nisi* having been granted,

T. Jones (of the Northern Circuit) showed cause in the first instance.—In *Larchin v. Willan*, 4 M. & W. 351,† the rule is laid down that if the defendant is about to leave the kingdom for some very temporary purpose, the case is not within the statute: but, as Alderson, B., says, “if he is going for such a purpose, or for such a length of time, as that he is not likely to be forthcoming when the plaintiff, by the ordinary course of law proceedings, would be entitled to judgment, and to have his body in execution, he has a right to prevent his departure.” That is consistent with *Hitchcock v. Hunter*, and is applicable here. [CROMPTON, J.—In *Larchin v. Willan* the point was whether it was shown that the defendant was about to leave the kingdom; no question as to abuse of process was before the Court. Can you show that, whenever the *67] body of the debtor is within the kingdom, though *brought here by force or fraud on the part of the creditor, the Court is bound to prevent his leaving it?] It may be that in such an extreme case a judge might be justified in discharging a debtor: but this is not such an extreme case.

H. Hawkins was heard in support of his rule.

WIGHTMAN, J.—In this case it appears that the defendant, being indebted to the plaintiffs on a cause of action which accrued abroad, was induced by a Mr. Smith to believe that he would have benefit from a personal interview with some party in England, and to come here in consequence, and that, on his doing so, he was immediately arrested. The first question is one of fact: Was he induced to come by a fraud to which the plaintiffs were privy? Now, on these affidavits, I entertain no doubt whatever that all the representations of Smith were mere fictions, made solely for the purpose of inducing the defendant to come to England that he might be arrested, and that the plaintiffs were parties to this delusion which produced the desired effect of bringing the defendant here, where he never would have come had he known the truth. Then, having no doubt at all that the defendant was lured to this country by the fraud of the plaintiffs, the next question arises: and it seems to me that the plaintiffs are disabled from taking advantage of their own fraud. It is much as if the plaintiffs had given the defendant an express undertaking that he should not be arrested whilst in England. I cannot doubt that, by giving such an undertaking, the plaintiffs would disqualify themselves from procuring an arrest. Bringing the defendant here by *68] fraud has at least *as much effect as if there were an express promise. In *Hitchcock v. Hunter* this Court, after consideration, thought the statute not imperative. If we have a discretion (and I do not doubt the

authority of that case) this is a case for the exercise of it. But I proceed on the ground that a party cannot avail himself of his own fraud.

CROMPTON, J.—It is not necessary to decide whether there is a discretion in a Judge or not. There is no doubt that, when it is made out that the debtor is about to leave the country, a Judge in general ought to make the order. But there may arise cases in which the amount of damages, and the length of time the party is about to remain abroad, and other things, are such as to make it hard to arrest the party; and this leads me to think that there may be a discretion, in a proper case, to refuse an order. But in the present case the process of the Court has been abused. The debtor, being a foreigner resident out of the jurisdiction, is by a concerted trick, amounting to a fraud, brought within it. I think that the plaintiffs, being parties to such a fraudulent abuse of our process, are prevented by a personal disability from availing themselves of the Act. I doubt much also whether a foreigner, brought into the country in this manner, can fairly be said to be about to quit England within the meaning of the Act. And the case is the stronger as the debt, debtor, residence and everything is foreign. But this rule is absolute on the ground that our process is abused.

(No other Judge was present.)

*H. Hawkins inquired whether the rule was to be absolute to set aside the service of the writ as well as the order. [*69

Per CURIAM.—The whole was an abuse of the process. It must all be set aside. Rule absolute accordingly.

Where a defendant is brought within reach of the process of a court by a trick, or by the fraudulent abuse of other process, the service of the writ will be set aside: *Addicks v. Bush*, 1 Phila. Rep. 19; see *Comm. v. Daniels*, 6 Penn. Law Jour. 330; *Williams v. Bacon*, 10 Wend. 636. Thus, in *Snelling v. Watrous*, 2 Paige 314, where the defendant was in contempt for not putting in an answer, and an attachment had been issued against him, upon which he could not be found, and afterwards, upon his application for his discharge under the insolvent act, the complainant, with the view of procuring his arrest on the attachment, obtained an order for his personal examination before the proper officer, and after his examination was closed, and as he was leaving the office, the complainant caused him to be arrested on the attachment; it was *held*, that he was entitled to be discharged, as his arrest had been procured by an improper contrivance.

The QUEEN v. The Justices of DERBYSHIRE. April 17.

Under stat. 5 & 6 W. 4, c. 50, s. 23, a special sessions was held, after the vestry had deemed a highway not to be of sufficient utility to justify its being kept in repair at the expense of the parish. The justices made an order deciding, in conformity with the determination of the vestry, that the highway was not of sufficient utility.

Held, that an appeal to the Quarter Sessions lay, by the persons dedicating the highway, against this order.

BODEN, at the instance of The Manchester, Sheffield and Lincolnshire Railway Company, had obtained a rule Nisi for a mandamus commanding The Justices of Derbyshire to enter continuances and hear the

appeal of the company against an order of justices. It appeared by the affidavits that the company had made a road, and given notice to the surveyors of the highways in the township of their intention to dedicate it as a highway to the public. The surveyors convened a meeting of the vestry, who deemed such highway not of sufficient utility to the inhabitants to justify its being kept in repair at the expense of the parish. The company were summoned before justices at a special sessions: and the justices made an order adjudging "that the highway so proposed to be dedicated as aforesaid is not of sufficient utility to the inhabitants to justify its being kept in repair at the expense of the inhabitants of the township." Against this order the company appealed: the Quarter Sessions, after argument, decided that they had no jurisdiction to hear an appeal against such an order.

*70] *Monk and A. J. Johnston* now showed cause.—Stat. 5 & 6 W. 4, c. 50, s. 23, enacts that no road made or hereafter to be made by and at the expense of any individual "shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person" "proposing to dedicate such highway to the use of the public shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner and of the width required by this Act, and to the satisfaction of the said surveyor and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required, on receiving notice from such person," "to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this Act, at the expense of the party requiring such view, which certificate shall be enrolled at the Quarter Sessions holden next after the granting thereof, then and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person" "for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate: provided nevertheless, that on receipt of such notice as aforesaid the surveyor of the said parish shall call a vestry meeting of the inhabitants of such parish, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway to appear before the justices at the next special sessions for the highways to be held in and for the division in which the said intended highway shall be situate; and the question as to the utility as aforesaid of such highway shall be determined at the discretion of such justices." The original decision under this section is by the vestry: if they decide against the party seeking to dedicate the road there is an appeal, and the question is to be decided according to the discretion of the justices at the special sessions. The contention on the other side must be that an appeal to the Quarter Sessions is given by sect. 105, "that if any person shall think himself aggrieved" by any "determination made, or by any matter or thing done, by any justice or other person in pursuance of this Act, and for which no particular

method of relief hath been already appointed, such person may appeal" to the Quarter Sessions. But here the Act has appointed a mode of relief by an appeal to the justices at the special sessions. [CROMPTON, J.—The grievance against which an appeal is given is the judicial determination, not the matter which gives rise to it. If this Court give judgment for the defendant in an action of debt, the plaintiff appeals, not against the defendant's non-payment of the debt, but against our decision in favour of the defendant. The vestry under this section are not acting judicially; they are parties interested, determining whether they will assent; and the parties are not aggrieved by their determination to refuse assent.] The language of the section, that it shall be "at the discretion" of the special sessions, shows that there was to be no appeal from their decision. No appeal is given against the allowance or disallowance *by the special sessions of the surveyor's accounts, either [*72 under sects. 48, 80, of the old Highway Act, 13 G. 3, c. 78; *Rex v. The Justices of the West Riding of Yorkshire*, 5 T. R. 629, *Rex v. Mitchell*, 5 T. R. 701; or under sects. 44, 105, of the present Highway Act (5 & 6 W. 4, c. 50): *Regina v. The Justices of the West Riding*, 1 Q. B. 624 (E. C. L. R. vol. 41); *Regina v. Justices of Leicestershire*, 8 E. & B. 557 (E. C. L. R. vol. 92).

Boden, in support of the rule.—The order against which the appeal was made was a determination of the justices within the very words of sect. 105. It is said, however, that a particular method of relief is given by the Act. That might be so if the justices at special sessions sat in appeal from a previous decision: but the whole proceedings, up to the time when the parties come before the special sessions, are *ex parte*. The decisions in *Rex v. The Justices of the West Riding of Yorkshire* and *Rex v. Mitchell* partly proceeded on the ground that the surveyor's accounts were, by the act then in force, to be allowed by one justice, and, in case he was not satisfied, by the special sessions. It was thought that this was in the nature of an appeal. This reason did not exist under stat. 5 & 6 W. 4, c. 50: but this Court, in *Regina v. The Justices of the West Riding*, gave another reason. Lord Denman, in delivering judgment, says (1 Q. B. 628): "The provision made for the surveyor's handing over the accounts after they should have been settled and allowed by the special sessions, showed that the Legislature did not intend the general appeal clause to apply;" and he adds, that the justices at special *sessions had power to examine the surveyor on [*73 oath. No such reason exists here. *Regina v. Justices of Leicestershire* was but an affirmance of *Regina v. The Justices of the West Riding*.

WIGHTMAN, J.—This rule must be absolute. In effect, unless there be an appeal to the Quarter Sessions in this case, there is no appeal from the first determination on the subject. In this respect the order differs from those discussed in *Rex v. The Justices of the West Riding*, 5 T. R. 629, and *Rex v. Mitchell*, 5 T. R. 701; for the old Highway Act contemplated that the surveyor's accounts should first come before one justice, subject to going before the special sessions; and that is adverted to in *Regina v. The Justices of the West Riding*, 1 Q. B. 624 (E. C. L. R. vol. 41). But the decision in that case was on a different section of the present Highway Act, and was based on this, that the special sessions had greater powers for investigating the surveyor's

accounts than the Quarter Sessions. It would have been an absurdity to send the accounts to the special sessions with power to examine the surveyor upon oath, and allow an appeal from their decision to a tribunal which could not do so, and might reverse the decision on account of the exclusion of his testimony. But under the present section (23) the first occasion on which there is any judicial determination is when the parties are before the special sessions; and if that determination is erroneous the party is aggrieved, and no special remedy is given to him. But, by the very words of sect. 105, if he considers himself aggrieved by it, he may appeal to the Quarter Sessions.

*74] *CROMPTON, J.—We ought to let the writ go unless we think clearly that there is no right. Now I have a strong opinion that the appeal does lie. The only difficulty arises from the decisions cited, which are on a different section. I do not think we should be justified in refusing the writ because of those decisions, which are distinguishable on the grounds adverted to. I think the decisions in *Rex v. The Justices of the West Riding* and *Rex v. Mitchell* were clearly right, on the ground that, under the Act there in question, if there had been an appeal to the Quarter Sessions it would have been a second appeal. The decision in the later case of *Regina v. The Justices of the West Riding* seems to have been partly on the principle of construing the new Act as following out the old enactment, and partly on the ground of special powers being given to the special sessions investigating the surveyor's accounts. But, under the section now before us, I think Mr. *Boden* is clearly right in saying that the proceeding before the vestry is not judicial at all, and that the first and only judicial determination is that of the justices in special sessions. If no appeal lies against that to the Quarter Sessions, there is no appeal at all. The argument was, that the grievance of the party was the refusal of the vestry, against which an appeal lay to the special sessions; but I think that the grievance against which sect. 105 gives an appeal is a judicial determination against which no other relief is given.

(No other Judge was present.)

Rule absolute.

*75] *RICHARD WATSON and JOSEPH PENNELL v. ANN McLEAN. April 17.

A., by deed, conveyed all his property to trustees for the benefit of his creditors. The conveyance contained general words, amongst others "all and singular other the personal estate and effects whatsoever," and all "writings" belonging to the same.

He was possessed, at the time, of a policy of insurance on his own life, the existence of which was not known to the trustees, and which remained in his possession. He died: the trustees, having afterwards learned the existence of the policy, claimed it from his executor, who refused to deliver it up, and who obtained the money from the insurance office.

Held, by the Exchequer Chamber, affirming the judgment of the Court of Q. B., that the legal property in the writing, and the beneficial interest in the contract, passed to the trustees by the deed; that they might maintain trover for the policy against the executor; and that the proper measure of the damages under the circumstances was the amount of the money obtained by it.

FIRST count, for money received to the use of the plaintiffs: 2d count, trover for a policy of insurance.

Pleas. 1. To first count, Never indebted. 2. To second count, Not

guilty. 3. To second count, that the policy was not the plaintiffs'. 4. To the whole, leave and license. Issues thereon.

On the trial, before Martin, B., at the Liverpool Spring Assizes 1858, it appeared that the defendant was the widow and executrix of James McLean. James McLean, on 11th July, 1854, effected a policy of insurance on his own life. On 8th June, 1857, he executed a deed of assignment to the plaintiffs in trust for his creditors. The operative words of the instrument conveyed to the plaintiffs, their executors, administrators, and assigns, "All and singular the stock in trade, goods, wares, merchandises, moneys, debts, bonds, securities for money, household goods and chattels, and all and singular other the personal estate and effects whatsoever and wheresoever belonging, due or owing to him the said James McLean. And all books of account, accounts, writings, vouchers, letters and documents relating to the same and every part thereof; and all the estate, right, title, interest, property, claim and demand whatsoever, both *legal and equitable, of him the said [76 James McLean in, to, or out of the said assigned premises and every part thereof: To have and to hold," &c. And McLean did, by those presents, "irrevocably nominate, constitute, and appoint" the plaintiffs, their executors, &c., "his true and lawful attorney and attorneys, in the name of him, the said James McLean, to ask, demand, sue for, recover, receive, of and from all and every person or persons indebted or liable unto him, the goods, wares, merchandises, sums of money, debts and effects which now are due, owing or belonging to him," and to give receipts and discharges, "and also to state, settle, and adjust, with any debtor or creditor of him, the said James McLean, any accounts or transactions now pending or unsettled," and to agree on the value of securities holden by McLean's creditors or concur in selling them, and to refer disputed claims and give time for payment, to appoint attorneys, "and generally to make, do, and execute any other matter or act, deed, matter or thing whatsoever, for the purpose of recovering, receiving, or obtaining payment of the moneys and debts, and possession and delivery of the goods and effects intended to be hereby assigned, as he the said James McLean might or could have done if these presents had not been made." There was also a proviso that, if all creditors whose debts amounted respectively to 10*l.* did not assent in two calendar months, or within such time as the trustees should in writing appoint, those presents should be void, without prejudice to acts antecedently done. The policy in question was not specified in the assignment; and the plaintiffs were ignorant of its existence till after James McLean's death. James McLean out of his own moneys paid the premium which became due in 1857, after the *assignment, [77 and died in 1857. The defendant, after his death, had an interview with the plaintiffs, when they claimed the policy as belonging to them. She afterwards applied to the insurance company, and obtained from them 100*l.*, the amount of the insurance. On this evidence the learned judge directed a verdict for the plaintiffs for 100*l.*, with leave to the defendant to move to enter a verdict for her or reduce the damages.

Edward James now moved accordingly.—There are no words in this assignment applicable to a policy; but, assuming it to be included in the general words, still no legal interest could pass, and no action at law can be maintained. [CROMPTON, J.—The effect of the assignment

of a contract is to make the assignor trustee for the assignee. But, though no legal interest passed in the contract, might not a legal interest pass in the instrument? WIGHTMAN, J.—Who was entitled to the custody of the policy when the plaintiffs demanded it from the defendant? If they were, why should trover not lie?] That would entitle the plaintiffs only to nominal damages. [CROMPTON, J.—A policy of insurance is a valuable thing, which may be, and very often is, sold, as in contracts for sales of cargoes to be paid for on handing over the shipping documents. And, if the defendant, by converting to her own use a policy the property of the plaintiffs, deprived them of 100*l.*, to which they were equitably entitled, and which they could have got by means of the policy, I do not see why there should not be damages.]

WIGHTMAN, J.—I think there should be no rule. This is trover for a specific chattel, a policy of insurance. Trover for a bond is a well *78] known and common action; *and there seems no doubt but that this policy was included in the assignment.

CROMPTON, J.—I also think it clear that the assignment passed the property in the policy as part of the assignor's personal estate. Though the right of action at law remained in the assignor, the property in the policy passed at law. For a moment I doubted as to this; but I think it clear that trover may be maintained. And there is no point as to damages; for the money was actually obtained by the conversion.

(No other Judge was present.)

Rule refused.

IN THE EXCHEQUER CHAMBER. June 17.

For syllabus, see *antè*, p. 75.

AN appeal having been brought against the decision of the Court of Queen's Bench in refusing the rule in this cause, *Edward James* now moved in this Court for a rule *Nisi* on a case containing the statements mentioned in the report of the case below, *antè*, p. 75.

Edward James, for his rule.—The testator did not intend to assign the policy. [COCKBURN, C. J.—Suppose he had intended to do so, what words would he have used other than these?] Even if he did so intend, the words are not sufficient. If the assignment does not authorize the creditors to pay the premiums, the policy would drop. The *79] policy creates no debt: it is in the *nature of a lawful wager on a man's life. In fact the party insured has no legal interest in the proceeds of the policy: his representative only has such interest. [COCKBURN, C. J.—Surely the party insured may assign the policy.] He may do so; and then, upon notice given to the office, an equitable claim accrues to the assignees. But, upon looking at this assignment, the subject-matter appears to be confined to existing debts, bonds, securities for money, and chattels. There are the words "personal estate and effects whatsoever:" but these must be construed with reference to the words preceding, and include only things *ejusdem generis*. The power of attorney extends only to debts then owing. Besides, it does not appear that the creditors have assented, so as to satisfy the proviso. [MARTIN, B.—That point was not taken below. WATSON, B.—It does not appear that there were creditors other than the trustees.]

That point then is not pressed. Suppose a party, possessed of a term created by a written lease, were to assign the written lease, no legal interest in the term would pass, but, at the utmost, only an interest in the paper or parchment. If, by the general words of this assignment, a policy would pass, a fortiori a bond would, even if not named (as in fact it is here). But here bonds, if not expressly named, would not pass: *Chanell v. Robotham*, Yelv. 68, where it was held that an obligation did not pass by the words "bona et catalla." It was there contended that the parchment and wax would pass by these words: but held that, as the debt was the principal, it was necessary that the words of the grant should comprehend such principal. But the Court allowed *that, if the grant were of 'all the grantor's goods and chattels in a specified box, obligations in that box would pass by reason of [*80 the expressed special reference. In *Ward v. Audland*, 8 Beav. 201, (a) Lord Langdale, M. R., held that a voluntary assignment of a policy of assurance retained in the hands of the assignor without notice to the grantor of the policy was not effectual, so as to enable the assignee to enforce it. All that would pass here would, at the utmost, be an equitable interest; a chose in action not being assignable at law. Supposing the document to have passed, the damages must be only nominal. The plaintiffs, by the alleged conversion, have lost only the power of going into equity.

C. Milward, contra, was not called upon.

COCKBURN, C. J.—This case appears to me to be a very clear one. Here is an assignment executed for the benefit of creditors, expressed in the largest and most comprehensive terms possible. There can be no doubt that the legal interest in the instrument of assurance passed by this, and that an interest in the contract contained in the instrument passed in equity. Therefore in no point of view was the executrix of the assignor entitled to receive the proceeds of the policy: not in equity, because the assignment passed the equitable interest; not in law, because the legal interest in the instrument passed. I think therefore that, having received the money unlawfully, she is liable to an action for money had and received. But, independently of that, the trustees, under the assignment, were entitled *to have the instrument. The defendant [*81 wrongfully applies it to her own purposes: she thus converts it to her own use. I think, therefore, that the amount which she receives is the measure of damages, because, if the plaintiffs had had the instrument, they would have had no difficulty in obtaining that amount. There is therefore no ground for a rule.

MARTIN, B.—I am of the same opinion. The argument is really put an end to by the question of the Lord Chief Justice of the Common Pleas, What other words could the assignor have used if he had desired to pass the policy?

WILLES, J.—As early as 2 Rol. Abr. 46, *Graunts*, (G.), pl. 2, it was laid down that, though a bond debt cannot be assigned, the parchment on which the bond is written may be assigned.

WATSON, B., and BYLES, J., concurred.

Rule refused.

(a) See as to the chattels assigned, *Ward v. Audland*, 16 M. & W. 862.†

Trover will lie for bonds, bills of exchange, for the payment of money, and the change, notes, and other instruments measure of damages will be what could

be recovered upon them: *Rogers v. Crombie*, 4 Maine 274; *Clowes v. Hawley*, 12 Johns. 486; *Ingalls v. Lord*, 1 Cowen 240; *Romig v. Romig*, 2 Rawle 249; *Taylor v. Morgan*, 3 Watts 334; *Biddle v. Bayard*, 13 Penn. St. 150; *Wight v. Hester*, 24 Georgia 485; *Dent v. Chiles*, 5 Stew. & Port. 383. So for a certificate of bank shares: *Conner v. Hillier*, 11 Richardson 193; though not for the shares themselves: *Sewall v. Lancaster Bank*, 17 Serg. & R. 286. That trover would lie for a policy of insurance, and that the proper measure of damages is the sum recoverable on the policy where there has been a loss, was admitted in *Kohne v. Ins. Co. of North America*, 1 Wash. C. C. 93. In *Sharp v. Whipple*, 1 Bosworth (N. Y.), 568, which was an action against an insurance broker for wrongfully converting a policy of insurance and its proceeds to his own use, and to that extent an action of trover, it appeared that the defendant had obtained a judgment against the insurers, and then compromised for a less sum than the policy called for, without any authority from the plaintiff. It was held that the latter might recover the full amount insured.

In trover for notes, the measure of damages, in the absence of any other evidence, is their apparent amount with interest: *Wight v. Hester*, 24 Georgia 485; *Ingall v. Lord*, 1 Cowen 240. And in Pennsylvania, it has been held that, under circumstances of aggravation, a jury might give damages even beyond this limit: *Taylor v. Morgan*, 3 Watts 334.

EDWARD ELLISS and ANN ELLISS v. RICHMAN ELLISS.

April 17.

Under sect. 169, Sched. (A.) No. 13, and sect. 180, of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), two tenants in common may join in a writ of ejectment, stating that they, or some or one of them, claim to be entitled: and the whole of the property to which they are entitled in common may be recovered on such writ.

EJECTMENT for one undivided moiety or equal half part of a messuage, buildings, and lands in Essex, "to the possession whereof Edward Elliss and Ann Elliss, *some or one of them, claim to be entitled, and *82] to eject all other persons therefrom."

On the trial, before Williams, J., at the last Essex Assizes, it appeared that Mary Elliss devised "my two undivided third parts or shares, and all other my estate, right, and interest whatsoever, of, in, and to all that messuage," &c., to her "sons John and Richman, and their heirs and assigns, absolutely and for ever." Mary Elliss died; and John Elliss and Richman Elliss survived her. Afterwards John died, leaving Richman surviving, through whom the present defendant, his son, claimed, by purchase from Sarah Elliss, the widow and devisee in fee of Richman Elliss the father. For the plaintiffs evidence was given that John Elliss had severed the joint tenancy by executing a deed, on 26th March, 1845, conveying his interest to a trustee for the benefit of Elizabeth Elliss, John Elliss's wife, for life, with power to her to appoint the fee by will, and, in default of appointment, to the heirs of John Elliss. John Elliss also, on the same day, made his will, devising thereby all his real and personal estate to Elizabeth Elliss. After his death, Elizabeth Elliss, by will, devised all her real estate, whatsoever and wheresoever, to the present plaintiffs, and to their heirs,

habendum to them and to their heirs in equal parts, share and share alike, as tenants in common, and not as joint tenants. She died without revoking or altering this will.

For the defendant it was contended: first, that the two plaintiffs, being tenants in common, could not recover their several shares in this action; and, secondly, that at any rate there was no evidence that Elizabeth Elliss had power to devise or appoint more than one-half of two-thirds of the premises. A verdict was found *for the plaintiffs, liberty being reserved to the defendant to move as after [*83 mentioned.

Hannen now moved (a) to enter a verdict for the defendant, or to reduce the verdict to one-third of the premises claimed.—As to the first point: the plaintiffs, under the old law, could not have recovered on a joint demise: *Doe dem. Poole v. Errington*, 1 A. & E. 750 (E. C. L. R. vol. 28). The question then is whether this is altered by The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). The object of that Act was to put an end to the fiction in the action, but in other respects to leave the action as it was before. [CROMPTON, J.—Before the Act, the declaration might have alleged separate demises to John Doe by each tenant in common: the Act, by sect. 169, prescribes the form of the writ, Schedule (A.) No. 13, whereby “A., B., & C., some or one of them, claim to be” “entitled.” Is not that equivalent to separate demises by each? Then that would supply what was wanting in *Doe dem. Poole v. Errington*.] By sect. 180 the question is to be, which of the claimants is entitled, and whether to the whole or a part, and, if to a part, to which part. But by this writ each claims for the whole. The second point arises also under the section last mentioned.

Cur. adv. vult.

The Court, in the same Term (May 5th), refused the rule on the first point; but granted a rule nisi to reduce the verdict.

The rule was not argued, the case having been compromised.

(a) Before Wightman and Crompton, Js.

***RANDALL and Another v. RAPER. April 21. [*84**

Declaration charged that defendant had sold to plaintiff seed barley, warranting it to be of a particular quality, but had delivered seed barley of an inferior quality: and it alleged, as special damage, that plaintiff, relying on the warranty, had sold the seed barley with a similar warranty to T., who had sown it and had thereby obtained a crop inferior to that which would have been produced by seed barley of the quality warranted, and so incurred damages which the plaintiff was liable to make good.

Defendant having suffered judgment by default, it was proved, on the execution of the writ of inquiry for damages, that the sale by plaintiff had taken place as alleged; and evidence was given of the pecuniary amount of the values of the crop obtained and the crop which would have been produced by seed barley of the quality warranted. It further appeared that the plaintiff's vendee had claimed from him compensation, which the plaintiff had agreed to make; but no sum had been agreed upon, and no payment actually made.

Held that, in assessing the damages, the jury ought to include the amount to which they considered the plaintiff had become liable to his vendee in respect of the difference of the crops. Wightman, J., dubitante.

THE first count charged that defendant, by warranting thirty quarters of seed barley to be then chevalier seed barley, sold the same to plain-

tiffs at and for a certain price, to wit, 1*l.* 2*s.* 6*d.* per quarter, which plaintiffs paid him: yet the said seed barley was not then chevalier seed barley; and plaintiffs, being corn-factors, and having purchased the said seed barley of defendant in the way of plaintiffs' said trade for the purpose of reselling, did, without having any notice or knowledge of the said breach of warranty, and believing the said seed barley to be chevalier seed barley, resell a portion of the same to one William Townsend, and another portion of the same to one James Dinsett, and another portion of the same to one William Joslin, and another portion of the same to one Wilson Lucking: and plaintiffs so resold those portions to those persons respectively, at and for divers prices, by warranting the same to be chevalier seed barley, when in fact it was not chevalier seed barley: and those persons respectively, not knowing or having any notice of that fact, sowed the same on their respective lands as and for chevalier seed barley; and the same, not being chevalier *85] seed barley, yielded *and produced much less and inferior crops, and crops of an inferior quality of barley, than the same otherwise would have done had the same been chevalier seed barley. And thereby the said purchasers, respectively, sustained and incurred damages, amounting in the whole (to wit) to 300*l.*, by means and in consequence of the plaintiffs' said breaches of the said warranties to them so made by the plaintiffs, and by their sowing the said seed on the faith of the same being true. And plaintiffs have become and are liable to compensate and make good to them, respectively, the damages by them so sustained and incurred as aforesaid. And plaintiffs have been and are, by means of the premises, injured in their credit in their said trade and otherwise, and have been and are otherwise injured.

Second count. That plaintiffs bargained and contracted with defendant to buy of him, and the defendant bargained and contracted with plaintiffs to sell and deliver to them, thirty quarters of chevalier seed barley for the price of 1*l.* 2*s.* 6*d.* per quarter: and plaintiffs then paid defendant the said price, and were always ready and willing to accept and receive, and did and performed all things, and all things happened and existed, to entitle them to have the said seed barley delivered to them: yet defendant never delivered to plaintiffs thirty quarters of chevalier seed barley, but delivered to them thirty quarters of seed as and for the said seed barley so bargained and contracted for as aforesaid; and plaintiffs accepted the same as and for the said seed barley so bargained and contracted for, not knowing or having any notice, as the fact was, that it was not that description of seed barley; and, believing that the same was chevalier seed barley, resold, &c. (as in the first count).

*86] *The defendant pleaded two pleas, but afterwards withdrew them under a judge's order; and judgment by default was signed; and a writ of inquiry issued to assess the damages.

On the execution of the writ of inquiry, before the deputy sheriff of Essex, on 8th April, 1858, it was agreed that the difference in price between chevalier seed barley and the seed barley delivered was 10*s.* per quarter, or 15*l.* for the thirty quarters. Evidence was then given of the sales by the plaintiffs, as alleged in the declaration: and it was proved that the loss to the parties who had purchased from the plaintiffs, by reason of the difference in their crops, was in all 261*l.* 7*s.* 6*d.*

These purchasers had made claims upon the plaintiffs for compensation; and the plaintiffs had agreed to satisfy them: but no amount had been fixed; nor had any sum been paid.

The deputy sheriff directed a verdict for 261*l.* 7*s.* 6*d.*, reserving leave for the defendant to move to reduce the verdict to 15*l.*

Bovill now moved to reduce the damage to 15*l.*, in pursuance of the leave reserved, or to set aside the execution of the writ, on the ground of misdirection and of the verdict being against the evidence. There ought not to have been any allowance for damages in respect of the plaintiffs having agreed to make compensation to their vendees: the amount of the compensation is not ascertained: indeed the claim itself is not definite. [Lord CAMPBELL, C. J.—If there is a probability of loss in that respect, the jury, it should seem, may estimate that.] The damage ought to be such as, according to the usual course of things, would arise naturally from the breach of the contract between the *plaintiffs and the defendant, or such as might reasonably be [*87 supposed to have been contemplated between the parties to the contract: *Hadley v. Baxendale*, 9 Exch. 341.† [CROMPTON, J.—In that case, it does seem that the defendants had some notice of the urgency of the case, so as to suggest to them the consequences of an unreasonable delay: but I feel a difficulty in seeing how such notice can affect the result.(a) In *Collen v. Wright*, 8 E. & B. 647,(b) where an agent was held liable to a party, with whom he contracted in the name of an alleged principal, for untruly (though without fraud) representing that he had the authority of such alleged principal to let a farm, the Court of Exchequer Chamber, as well as this Court, held that the agent was bound to compensate the party to whom he made the representation for the expenses which that party had sustained in attempting to enforce specific performance against the alleged principal, after giving notice to the agent of the intended proceedings, the agent not retracting his assertion of the authority.] In *Hamlin v. Great Northern Railway Company*, 1 H. & N. 408,† the plaintiff sued a railway company for not performing a contract to carry him according to the announcement of its arrangements: and it was held that he could not recover damages in respect of his having been thereby obliged to break appointments with customers. [Lord *CAMPBELL, C. J.—[*88 Those damages were uncertain.] The damages claimed here are [*88 equally so. [CROMPTON, J., referred to *Waters v. Towers*, 8 Exch. 401,† cited in *Hadley v. Baxendale*, 9 Exch. 341.†] In an action for breach of contract to deliver goods at a specified time, the measure of the damages is the difference between the contract price and either the market price at the time specified, or, if the purchaser have sold over, the price at which he has so sold: but the anticipated profits which such purchaser's vendee might have made cannot be taken into account: *Peterson v. Ayre*, 13 Com. B. 353 (E. C. L. R. vol. 76). That is the rule upon which the present defendant insists. The question of the measure of damages for breach of warranty was much discussed in

(a) The view of the Court of Exchequer as to this appears to be intimated in the following passage: "Had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them:" 9 Exch. 355.†

(b) In Exch. Ch., affirming the judgment of Q. B. in *Collen v. Wright*, 7 E. & B. 301 (E. C. L. R. vol. 90).

Clare v. Maynard, 6 A. & E. 519 (E. C. L. R. vol. 33). [WIGHTMAN, J.—That was the case of the loss of a bargain: the claim here is in respect of a liability incurred. But do you contend that, if the plaintiffs had actually paid money in satisfaction of that liability, they could not have recovered it in this action?] The authorities go as far as that.

Lord CAMPBELL, C. J.—I am of opinion that in this case there should be no rule. The defendant contends, in the first place, that, even if the plaintiffs had actually paid to the subvendees the amount of the damage suffered by these latter, the money so paid could not have been recovered in this action. But I am clearly of opinion that in that case the plaintiffs, being compelled to pay these damages to the subvendees for breach of a warranty similar to that given by the defendant to the *89] plaintiffs, would have been entitled to recover such *damages as special damage in this action. It was a probable, a natural, even a necessary, consequence of this seed not being chevalier barley that it did not produce the expected quantity of grain. That is a consequence, not depending upon the quality of the soil, but one necessarily resulting from the contract as to the quality of the seed not being performed. But then it is contended, secondly, that, even if the damages could be recovered in the event of actual payment, they cannot be recovered upon a mere liability. I think we cannot lay down a rule that the mere liability cannot be the foundation of damages: if it can, the amount may be estimated by a jury. The demand is made, and is a just one: and, though it is not yet satisfied, yet the jury may find to what extent the plaintiffs are damnified by their having become liable to it.

WIGHTMAN, J.—I have no doubt, on general principles, that the plaintiffs, if they had paid these damages to their vendees, might have recovered them in the present action. But the doubt which I entertain arises from this. At present, all that has been done is that the subvendees have made a claim for damages; and, as these damages are unliquidated, more or less than what is claimed may be given. Now, on a contract of indemnity, it is only the actual loss that can be recovered. Here eventually no loss may be suffered. I do no more than mention this doubt.

ERLE, J.—The question is, what amount of damages is to be given for the breach of this warranty. The warranty is, that the barley sold should be chevalier barley. The natural consequence of the breach of *90] such *a warranty is that, the barley which has been delivered having been sown and not being chevalier barley, an inferior crop has been produced. This damage naturally results from the breach of the warranty: and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from chevalier barley: that is not inconsistent with Hadley v. Baxendale, 9 Exch. 341.† But then it is said that here the plaintiffs have made no actual payment; so that, if they recovered such damages in this action, they might put them into their own pockets without paying the subvendees. But I think that the true rule is, that a liability to loss is sufficient to give the party liable a title to recover.

CROMPTON, J.—Taking the narrowest rule as to the probable and necessary consequences of a breach of contract, these damages fall within it. It is said, however, that the plaintiffs have here only incurred

a liability, and have made no payment. But I entirely deny that payment is necessary to entitle a party to recover. Liability alone is sufficient. It has always been customary to state, in the allegation of special damage, "whereby the plaintiff became liable to pay:" I recollect a discussion once arising, whether an allegation "whereby the plaintiff paid" was sufficient without an allegation "whereby the plaintiff became liable to pay:" but I do not recollect a discussion whether the latter allegation was sufficient without the former. In actions for bodily injuries the liability to pay the surgeon's bill is always allowed as an item in the damages. It is quite *clear to me that in this case [*91 the liability of the plaintiffs to pay their subvendees would be a proper item in estimating the damages. In an action for breach of contract you can recover only once; and the action accrues at the moment when the breach occurs. A liability to payment, which has been incurred by a plaintiff in consequence of the breach of a defendant's contract, may well form a part of the damages, though it may be difficult to estimate them.

Rule refused.

Where an article is sold with a warranty, and the vendee resells with a like warranty, the sum paid by him in an action by his subvendee, for a breach of that warranty, is *prima facie* evidence of the amount which he will be entitled to recover, from his vendor, in an action on his own behalf: *Reggio v. Braggiotti*, 7 Cushing 166; *Armstrong v. Perry*, 5 Wend. 505; *Blasdale v. Babcock*, 1 Johnson 518.

In *Muller v. Eno*, 4 Kern. 597, it was held that a purchaser may recover for a breach of a warranty although he has sold the goods, and no claim has been made on him, and that it was not necessary for him to show the price on the resale. That price may be evidence of the damages, but does not furnish the rule in respect to them.

CATTELL, Appellant, v. IRESON, Respondent. April 21.

As information before justices, under stat. 1 & 2 W. 4, c. 32, s. 23, for using an engine for the purpose of taking game, without the authority of a certificate, is a criminal proceeding in which the party is charged with the commission of an offence punishable on summary conviction, within the meaning of sect. 3 of stat. 14 & 15 Vict. c. 99; and, therefore, the party charged is not competent or compellable to give evidence for or against himself.

THIS was a case stated by justices for the opinion of this Court under stat. 20 & 21 Vict. c. 43.

"At a petty sessions of the peace holden in and for the division of Lutterworth, in" Leicestershire, 24th December, 1857, before the undersigned, &c. (names of three justices of the division), "John Cattell, the above-named defendant, was charged in and by a certain information for that, on the 7th day of November, 1857, at," &c., "he, the said John Cattell, did unlawfully use certain engines, to wit, two snares, for the purpose of then and there taking game on certain land in the occupation of Thomas Cattell, there situate; he the said John Cattell not being then and there authorized so to do, for want of a game certificate. And, the said parties respectively being then present, the said charge was duly

heard by us; and upon such hearing, we adjudged the said John Cattell *92] to be convicted of the said offence, *and to forfeit and pay the sum of 5*l.*, and, in default of immediate payment, to be imprisoned in the house of correction at Leicester in the said county of Leicester, and there to be kept to hard labour for the space of one calendar month." The case then stated that the defendant had required a case, which the justices stated as follows.

"At the hearing of the said information, and on the close of the informant's case, Mr. Stephen Mash, the attorney for the defendant Mr. John Cattell, tendered the said defendant John Cattell to be sworn as a witness in his own behalf, and contended that the defendant was so entitled to be put upon his oath, and to be examined and give evidence under the statute of 14 & 15 Vict. c. 99, s. 2: and Mr. Mash contended that the words of exception, occurring in the third section of the statute, 'or any offence punishable on summary conviction,' must be read in conjunction with the preceding words 'any criminal proceeding;' and that, in order to exclude the defendant, the offence punishable on summary conviction must be of a criminal nature, which this was not. Mr. Mash also cited the case of *The Attorney-General v. Radloff*, 10 Exch. 84,†" &c. "The gentleman who appeared in support of the information contended, on the other hand, first, that this was an offence punishable on summary conviction, and for which no private redress could be had, and that criminal proceedings include an offence punishable on summary conviction, and, therefore, that the third section of the said statute clearly renders the defendant incompetent to be a witness either for or against himself.

*93] "And whereas, upon the said hearing, we, being of opinion that this was an offence punishable on summary conviction, the defendant was not a competent witness either for or against himself, and we therefore rejected his evidence and refused to swear him. A witness was then tendered and examined for the defendant: and we then convicted him as aforesaid."

The question stated was, Whether the justices were correct in point of law, and what should be done in the premises.

Welsby, for the respondent.—The appellant was clearly not competent to give evidence for himself, unless a competency was created by stat. 14 & 15 Vict. c. 99. Sect. 2 of that Act enacts that, "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto," &c., "shall, *except as hereinafter excepted*, be competent and compellable to give evidence" "on behalf of either or any of the parties." But, by sect. 3, "nothing herein contained shall render any person who *in any criminal proceeding is charged with the commission of* any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself." The question, therefore, is, whether the appellant was here charged with the commission of any offence punishable on summary conviction. Now he was charged with unlawfully using engines for the purpose of taking game, not being authorized to do so, for want of a game certificate. The

*proceeding was under stat. 1 & 2 W. 4, c. 32, s. 23 of which [94 enacts that, if any person shall use any engine or instrument for the killing or taking game, he "not being authorized to do so for want of a game certificate, he shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction." This, therefore, is a summary "conviction" for an "offence," by the words of the section. By sect. 38, the justices may adjudge that the sum be paid immediately, or within such period as they shall think fit, "and that in default of payment at the time appointed such person shall be imprisoned in the common gaol or house of correction (with or without hard labour), as to the justice or justices shall seem meet, for any term not exceeding two calendar months where the amount to be paid, exclusive of costs, shall not amount to 5*l.*, and for any term not exceeding three calendar months in any other case, the imprisonment to cease in each of the cases aforesaid upon payment of the amount and costs." The proceeding has thus all the characteristics of a "criminal proceeding," which no doubt is necessary in order to bring the case within the exception in sect. 3 of stat. 14 & 15 Vict. c. 99. In *Attorney-General v. Radloff*, 10 Exch. 84,† the Court of Exchequer was equally divided on the question whether a party could be a witness on his own behalf against whom an information was filed by the Attorney-General for the recovery of penalties for smuggling under sects. 46 and 82 of stat. 8 & 9 Vict. c. 87. The Judges who thought the evidence admissible did so on the ground that they considered that *pro- [95 ceeding to be civil, not criminal. [ERLE, J.—There might be a civil proceeding here for a trespass: but this proceeding is for the revenue.(a)] Sect. 23 of stat. 1 & 2 W. 4, c. 32, preserves the remedy for the revenue distinct, by providing "that no person so convicted shall by reason thereof be exempted from any penalty or liability under any statute or statutes relating to game certificates, but that the penalty imposed by this Act shall be deemed to be a cumulative penalty." Sect. 23 therefore has not in view any fiscal object, but treats the user of the engine by an uncertificated person as a public offence.

Hayes, Serjt., *contrà*.—The question was thoroughly discussed in *Attorney-General v. Radloff*. The effect of stat. 1 & 2 W. 4, c. 32, is to repeal all the then existing game laws, and to frame a scheme entirely new. Now sect. 6, which authorizes a certificated person to kill and take game, makes that authority "subject always to an action, or to such other proceedings as are hereinafter mentioned, for any trespass by him committed in search or pursuit of game." Then follow enactments merely applicable to civil rights: the first section imposing a penalty being the 12th, which is itself only pointed to the relative rights of the landlord, &c., and occupier, imposing a penalty on the occupier if he pursue, kill, or take game on land where the game has been reserved or belongs to another, and imprisonment (by sect. 38) *in default of payment. This cannot be considered as constituting [96 a crime. [Lord CAMPBELL, C. J.—Where a statute forbids an act, it is an indictable crime to do that act, unless where a specific penalty

(a) By sect. 37 of stat. 1 & 2 W. 4, c. 32, the penalties are to be paid over to the use of the county rate: but, by sect. 21 of stat. 5 & 6 W. 4, c. 20, one moiety is to go to the informer. See *Regina v. Hyde*, note (a) to *Regina v. Cridland*, 7 E. & B. 859 (E. C. L. R. vol. 90).

is imposed.] But not where a specific penalty is imposed, as here. The act which is the subject of this information is neither a felony nor a misdemeanor. The imprisonment is imposed, not for the act, but for the non-payment: it is analogous to a ca. sa. for a debt. [CROMPTON, J.—It may be imprisonment with hard labour.] The utmost inference that can be drawn from that is that it is a crime not to pay the penalty; not that it is a crime to do the act for which the penalty is imposed. The penalty proves no more than would be proved by a penalty recoverable in a *qui tam* action. Formerly a fine was payable to the Crown upon a judgment against the defendant in an action of trespass; and he might also be imprisoned, &c.(a) Under sect. 24 a penalty is imposed for having in possession an egg of a wild duck, teal, &c., taken on land by any person not having a right to kill game there: but it would be extravagant to suppose that this possession was made criminal. [CROMPTON, J.—Upon a proceeding under the bastardy laws the putative father is admitted as a witness in his own case. *Welsby*.—That is because the proceeding, being instituted by the mother, is in the nature of a civil proceeding.] It is obvious that, if the lessee of land kills game which has been reserved by the lease to the lessor, it is merely a case of breach of contract. But, whether there be a breach of contract or a trespass, the remedy is in the nature of a civil remedy: and it cannot be allowed *97] that the defendant should lose the benefit of his own testimony by the proceeding being shaped as an information. [Lord CAMPBELL, C. J.—Under the old game law statutes, very severe punishments were imposed for acts in themselves apparently trifling.] They were so, in terms leaving no doubt that the acts were then treated as crimes: the question is whether that is not now altered. No stress can be laid on the word “offence:” it means merely a breach of the enactment of the particular Act. The word “offender” is applied, in stat. 5 & 6 W. 4, c. 76, s. 60, to a town clerk who does not deliver up his documents on quitting office: yet the committal by a magistrate under that section is only a civil proceeding: *Eggington’s Case*, 2 E. & B. 717 (E. C. L. R. vol. 75). It is probable that, if county courts had been in existence at the time when this statute was passed, the jurisdiction for the recovery of this penalty would have been given to them.

Welsby, in reply, was stopped by the Court.

Lord CAMPBELL, C. J.—I am clearly of opinion that the magistrates were right in refusing to admit this evidence. It was allowedly inadmissible before stat. 14 & 15 Vict. c. 99. Then was not this, within the meaning of sect. 3 of that Act, a criminal proceeding for an offence punishable on summary conviction? It is our business, not to estimate the degree of moral guilt involved in the act of the appellant, but to see how such act is treated by the Legislature. Now, when we refer to the statute 1 & 2 W. 4, c. 32, s. 23, on which the information is founded, *98] we find that the information is meant to be a criminal proceeding for an offence punishable on summary conviction. If any person shall use an engine for taking game, not being authorized by certificate, “he shall, on conviction thereof before two justices of peace, forfeit and pay for every such offence such sum,” &c.: and, by sect. 38, in default of payment, he “shall be imprisoned in the common gaol or house of correction,” and that “with or without hard labour.” I see that the

(a) Before stat. 5 & 6 W. & M. c. 12. See *Beecher’s Case*, 8 Rep. 58 a, 59 b.

Legislature has there made the act a crime, punishable by fine or imprisonment. It is not like the case of an order in bastardy, where the mother takes the proceeding for the purpose, not of punishing the immorality, but of obtaining support for the child: nor is it like a fiscal proceeding, nor like a proceeding for a civil right, nor like a proceeding before a magistrate for a wrong done to the party applying. I do not proceed on the ground that sect. 23 uses the word "offence," but on the ground that it treats the act as an offence. That being so, was not this proceeding instituted for an act punishable on summary conviction, to punish a person who had violated the statute and was punishable for that? I cannot be bound by any opinion I may form of the morality of that act: but I must see what it is that the Legislature has chosen to punish. Now I am clearly of opinion that that which sect. 23 forbids is treated by the Legislature as a crime; and the enactment has in view the punishment of the offender. If that is not what the statute does, I really do not know what words would do it: certainly my brother *Hayes* has not told us.

(WIGHTMAN, J., had left the Court.)

ERLE, J.—I also am of opinion that this is a criminal *pro- [*99
ceeding for an offence punishable on summary conviction: that is, for using engines to take game, without the authority of a certificate. On proof of this the magistrate may impose a fine; and, if that is not paid, may inflict imprisonment with hard labour. Now such a punishment is applicable only to a criminal proceeding. The whole effect of the enactment is to create something in the nature of a criminal proceeding in respect to the destruction of game. Game is of a character intermediate between that of animals which are domesticated and thus the subject of property, and that of animals which are wild and thus not the subject of property. The invasion of that which this statute meant to protect is, according to the intention of the Act, to be prevented by something like a criminal proceeding. The proceeding against trespassers is made very like a criminal proceeding: a party who will not give his name may be taken before a magistrate.^(a) Another ground of my opinion, that this evidence ought not to be admitted, is this: supposing the question to be only one of a civil right, the party might be compelled to bear witness against himself: that would be a strong case of the infringement of the principle that a man is not to be compelled to criminate himself.

CROMPTON, J.—It seems to me that this is clearly an offence punishable by a summary proceeding under the Act, and of a criminal nature. The first circumstance which I remark is that the act is punishable by a fine according to the magnitude of the offence; and, if the fine is not paid, the punishment falls upon the person, *to an extent, I [*100 presume, equivalent to a fine. My brother *Hayes* says that the imprisonment is only by way of punishment for the failure to pay. I think that is not so; but that the effect of the enactment is that, if the party convicted cannot pay, an imprisonment is to be awarded adequate to the offence. My brother *Hayes* says that in an action of trespass the party would be allowed to be a witness: but this proceeding has a different object. The action of trespass is brought in respect of damage done to the plaintiff: but the proceeding under this statute is for the

(a) Sect. 31.

offence of meddling with game; and nothing is recovered. There is an absurdity as my brother Erle has pointed out, in putting a man into the box and asking him whether he has committed the offence: yet he would be compellable to answer if he were competent to give evidence for himself. I am of opinion, without any doubt at all, that this is a criminal proceeding for an offence punishable on summary conviction; and that the magistrates were right.

Appeal dismissed.

In the Matter of HOPKINS. *April 21.*

Where an appeal is determined, at Quarter Sessions, by magistrates some of whom are interested in the matter, the proceeding is null; and the proper course is to quash it on certiorari.

H. S. GIFFARD, in last Michaelmas Term (November 23d, 1857), moved for a certiorari to bring up an order of Quarter Sessions, confirming, on appeal, a conviction, under the hands and seals of two justices of Glamorganshire, whereby Abraham Hopkins was convicted of an offence against the by-laws and regulations of The South Wales Railway Company.

*101] *It appeared, upon affidavit, that the conviction was for travelling in a second-class carriage with a third-class ticket: and that some of the magistrates who took a part in deciding on the appeal were shareholders in the company. The information was preferred, on behalf of the company, by the superintendent of their police.

H. S. Giffard, in support of his application, contended that the proceedings under the appeal were absolutely null. [ERLE, J.—There has been no proceeding before a proper tribunal: and the act of Sessions is null. Lord CAMPBELL, C. J.—The subject cannot be deprived of this right of appeal.] The proper remedy is therefore to quash the proceeding.

The Court (*a*) granted the rule.

It was afterwards discovered that the notice upon the justices had not been properly served: whereupon an order for a certiorari, absolute in the first instance, was granted at Chambers: and, in Hilary Term of this year, a rule nisi was obtained to quash the order of Sessions, which rule was this day made absolute, no cause being shown.

(*a*) Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js.

*102] *TIMOTHY ORMOND v. HENRY CHARLES HOLLAND and RICHARD DAVID HOLLAND. *April 22.*

A master is responsible to his servant for the injury received in the course of his service, if it be shown to have been occasioned by the personal negligence of the master. Such negligence may be brought home to the master by showing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants, whose incompetency was the cause of the accident: but in the absence of a special contract, the master is not liable for an accident not proved to have been occasioned by his personal negligence.

FIRST count: That plaintiff became servant to defendants, in the

way of their trade as builders, on the terms that defendants should take due and ordinary care not to expose the plaintiff to extraordinary danger and risk in the course of his said service. Breach: That defendants did not take due and ordinary care not to expose the plaintiff to extraordinary danger; and by the negligence of the defendants a ladder, on which plaintiff was working, broke; and he fell and was injured.

2d count: That plaintiff became servant to defendants, in their business as builders, on the terms that defendants should provide and use proper materials and implements, so as to make the plaintiff reasonably safe whilst working for the defendants. Breach: That they negligently provided and used improper materials and implements, whereby a ladder used by them broke and plaintiff was injured.

Pleas: 1. Not guilty. 2. To first count: That plaintiff did not become servant to the defendants on the terms alleged in that count. 3. To second count: That plaintiff did not become servant to the defendants on the terms alleged in that count. Issues thereon.

On the trial, before Lord Campbell, C. J., at the Middlesex Sittings after Michaelmas Term, 1857, it appeared that the defendants are builders on a large scale, engaged in many works, and, amongst others, that of erecting a church; and that the plaintiff was working for them as a bricklayer there. The defendants did not *personally [*103 interfere in the hiring of the plaintiff, which was by their foreman at the church in the ordinary way, with no express contract as to the care to be used by the defendants. The plaintiff was going up a ladder supplied by the builders, when one of the rounds broke: he fell, and was injured. There was some evidence that the ladder was defective, and that the workmen had previously complained among themselves of its state; but no evidence that this was brought to the knowledge of the defendants, or even of their head servants. On the part of the defendants evidence was given that they employed a general foreman, who appointed the foremen to superintend each particular work, including the foreman at the church. All implements used by the defendants at any of their works were brought from a yard in which the implements were kept. The gatekeeper at that yard was appointed by the general foreman of the defendants. It was the duty of this gatekeeper to examine all plant before it went out of the yard, and to see that it was fit for use. Both the foremen at the church and the gatekeeper gave evidence that in their opinion the ladder was sound, and that the breaking of the round must have been owing to some unexplained accident. Lord Campbell, C. J., ruled that there was no evidence to go to the jury, and directed a verdict for the defendants, subject to leave to move to enter a verdict for 5*l.*; the Court to have power to draw inferences of fact from the evidence.

Howley, in Hilary Term, obtained a rule nisi accordingly.

Hugh Hill now showed cause.—No evidence was given of any special terms made on the hiring of the plaintiff in this case; and therefore the liability of the defendants *to the plaintiff is no more than [*104 what is implied by law from the relation of master and servant in such an employment as this. The master, in the absence of a special contract, is not liable to his servant for an accident occurring to the servant, unless it can be shown that the master was himself guilty of

negligence. If he personally interferes and is guilty of negligence he is liable; or if he negligently chooses incompetent servants, and in consequence of their incompetence the accident occurs, he is liable for his own personal negligence in choosing such servants: but, unless some neglect be brought home to him personally, he is not responsible for the consequences of an accident occurring to a servant in his employment: *Wigmore v. Jay*, 5 Exch. 354,† *Skipp v. Eastern Counties Railway Company*, 9 Exch. 223,† *Tarrant v. Webb*, 18 Com. B. 797 (E. C. L. R. vol. 86). At the trial it appeared that the defendants did not personally interfere in any way, beyond employing their general foreman, who selected the subordinate foremen; and there was no evidence of any negligence on their part in the selection of that general foreman or in the directions which they gave him. In *Roberts v. Smith*, 2 H. & N. 213,† (a) the Court of Exchequer Chamber granted a new trial, but not on any ground impeaching the authority of the cases already cited. There Willes, J., said: "It must be understood that this rule is granted upon the ground that there appears to have been evidence of the personal interference and negligence of the master."

Howley, in support of his rule.—There was evidence that the accident *105] was occasioned by the defective state of the ladder. [Lord CAMPBELL, C. J.—Do you contend that there is a warranty on the part of the master that the materials supplied are sound?] No; but the master's duty is to take reasonable care that they are sufficient. *Prima facie* a gatekeeper is not competent to judge whether the plant was good or not; and as, in this case, the gatekeeper did in fact pass a defective ladder, there was some evidence that an incompetent person was appointed. [ERLE, J.—No doubt the master is responsible if he is shown to have been personally negligent. But the evidence seems to be that the defendants personally were free from all blame.]

Lord CAMPBELL, C. J.—We all agree that the action is not maintainable. There was no evidence of personal negligence: the builders used due and reasonable care to have competent servants; and I think they used more than ordinary care, and took extraordinary precaution, that the plant should be sufficient. There being no evidence of personal negligence, either by interference in the work, or in hiring the servants, or in choosing the implements, I am inclined to take some blame to myself for encouraging this application to the Court; for, according both to decided cases and to principle, it must fail.

WIGHTMAN, J.—The question is, whether the misfortune which befell the plaintiff arose from want of proper care in the defendants, either in choosing their servants or in examining the plant. It is said that the person appointed to examine the materials was selected because he was gatekeeper, and that he is therefore presumably incompetent. I should rather infer that he was made gatekeeper because he had been selected *106] to examine the materials: but at all events there was no evidence that he was incompetent; or, even if he was, that there was any negligence in the defendants personally. The case is clearly within the principle of the decisions cited, which was not contradicted in *Roberts v. Smith*, 2 H. & N. 213.†

ERLE, J.—On these facts the defendants have shown that they took

(a) See authorities cited in *Blakemore v. Bristol and Exeter Railway Company*, 8 E. & R. 1035, 1042 (E. C. L. R. vol. 92).

due care. The question of law therefore is, whether the master warrants the soundness of the materials. And he does not.

CROMPTON, J.—I think that the rule of law laid down by Mr. *Hill* is accurate, namely, that the master is not liable unless there be personal negligence on his part, which negligence may be either in personally interfering in the work, or in selecting the servants who do interfere. On this point we are concluded by the decisions in Courts of co-ordinate jurisdiction. I do not know whether the appeal in *Roberts v. Smith* was brought with the intention of questioning that principle. But the Court of Exchequer Chamber, of which I formed one, made the rule absolute on the ground that there was evidence in that case of personal negligence in the master. I do not think that the principle has as yet been considered in a Court of error at all; but it certainly was not shaken by the decision in *Roberts v. Smith*. In the present case there seems to have been no evidence of any negligence; it is enough to say that there certainly was no evidence of personal negligence of any kind. The principle therefore is applicable; and the rule must be discharged.

Rule discharged.

***HALL v. TAYLOR, Clerk to The Commissioners of STALY- [107
BRIDGE. April 22.**

Commissioners were appointed, to be annually elected, for executing a local Act (9 G. 4, c. xxvi.). They had power to levy rates. By the Act they had power to appoint clerks and other officers, and to pay them salaries out of the money to be raised under the Act. They had power to execute many works. By the Act they might sue and be sued by their clerk; and the Commissioners were exempted from personal liability for any contracts entered into by them as Commissioners.

Held, that a clerk, appointed by the Commissioners for one year, might maintain an action for his salary against the clerk of the Commissioners in a subsequent year.

Held also, that it was within the scope of the authority of the Commissioners to employ an attorney; and that he might recover in an action against the clerk of the Commissioners in a succeeding year.

ACTION against the defendant as clerk to the commissioners of Stalybridge, being the commissioners appointed for carrying into execution stat. 9 G. 4, c. xxvi., (a) for work and labour for the commissioners. Plea: Never indebted. Issue thereon.

On the trial, before Lord Campbell, C. J., at the Middlesex Sittings after Michaelmas Term, 1857, it appeared that the plaintiff was, in 1855, appointed clerk to the commissioners, without any specific salary being fixed, and performed the duties for that year. He was reappointed in 1856, at a salary of 80*l.*, and performed the duties during that year. He was also employed professionally as a solicitor by the commissioners. The action was brought to recover two years' salary and the amount of his bill. The persons who were commissioners at the time this action was commenced, were not the same persons as those who were commissioners *either at the time when the plaintiff was clerk, [108
or at the time when the work was ordered and done. The plain-

(a) Local and personal, public. "For lighting, watching, and otherwise improving the town of Stalybridge in the counties palatine of Lancaster and Chester, and for regulating the police thereof; and for establishing and regulating a market, and erecting a market place, within the said town."

tiff had a verdict; the amount to be referred, subject to leave to move to enter a verdict for the defendants on the ground that the action did not lie for either part of his demand.

Welsby, in next Term, obtained a rule nisi accordingly on the authority of *Bogg v. Pearse*, 10 Com. B. 534.(a)
 *109] **Atherton* and *T. Jones* (of the Northern Circuit) now showed

(a) The Act on the construction of which that case was decided was 8 & 9 Vict. c. clxxvii. (local and personal, public): "For more effectually paving, cleansing, lighting, and otherwise improving the parish of Saint Mary Magdalen Bermondsey in the county of Surrey." The following sections of both Acts were referred to in the course of the argument.

Stat. 9 G. 4, c. xxvi. Sects. 1 to 11 provide for the election of Commissioners for the purpose of carrying that Act into execution, who are to be elected annually on the first Wednesday in May in each year, and hold office until their successors are elected.

Sect. 12. "That it shall be lawful for the Commissioners at any of their meetings from time to time to nominate and appoint one or more person or persons to be their clerk or clerks, treasurer or treasurers, surveyor or surveyors, assessor or assessors, collector or collectors of the rates, tolls, duties, rents, and other moneys to be imposed, levied, raised, or received under or by virtue of this Act; also all such market lookers or inspectors of markets to be held within the said town, inspectors of nuisances, scavengers, cleansers, lighters of lamps, firemen, keepers of fire engines, and such other officers, deputies or assistants, as the said Commissioners shall think necessary for the execution of the several purposes of this Act;" and to take security from their officers, and to remove them from time to time and appoint others; "and also, out of the moneys to be raised as hereinafter mentioned, to make and pay such wages, salaries, and other allowances to the said officers respectively, and also to such other person and persons as shall be aiding and assisting the said Commissioners in the execution of this Act, as to the said Commissioners shall seem reasonable."

Sect. 18. Commissioners shall and may sue and be sued in the name of their clerk or treasurer. Provided that the clerk or treasurer "shall always be reimbursed and paid, out of the moneys to be raised by virtue of this Act," all his costs and charges, "and shall not be personally answerable or liable for the payment of the same or any part thereof, unless such action or suit shall arise in consequence of his own neglect or default," or be brought or defended without the sanction of the Commissioners.

The Act then contains provisions enabling the Commissioners to build a market place and take tolls in it, and to erect works and buy land for that purpose, and for the other purposes of the Act.

Sects. 145, 146, authorized the making of contracts for these purposes.

Sect. 147. "That nothing in this Act, or in any deed, contract, lease, or other instrument hereby authorized to be entered into or made by the said Commissioners for executing this Act, or any of them, shall extend to charge the person or persons of all or any of the Commissioners executing any such deed, contract, lease, or other instrument," or their representatives or their property, "with or for the performance of all or any of the covenants, conditions, or agreements in the same deed," &c., "contained. But the amount of all costs, charges, damages, and expenses which shall or may be recovered in any suit or suits at law or in equity against the said Commissioners or any of them" by reason of such contracts, and their costs, "shall be respectively paid and discharged by and out of the moneys to be raised or to arise or be received by virtue of this Act."

Sect. 148 and the following sections authorize the Commissioners to levy a highway-rate, and a police and improvement rate, and to raise money by the mortgage of those rates and the market tolls.

Stat. 8 & 9 Vict. c. clxxvii., sects. 1 to 33, appoints Commissioners for executing the Act, of whom one-third was annually to go out in rotation.

Sect. 33. "That it shall be lawful for the Commissioners to enter into contracts with any persons for the execution of any works" directed by the Act.

Sect. 34. "That every such contract shall be signed by any three of the Commissioners, and such contract shall be binding on the Commissioners, and actions and suits may be maintained thereon, and damages and costs recovered by or against the Commissioners, or the other parties failing in the execution thereof."

Sect. 37. "That nothing in any deed or contract by this Act authorized to be made by or on behalf of the Commissioners for any of the purposes of this Act, shall extend to charge or affect the persons of any of the Commissioners" or their property for the performance thereof, "but the amount of all damages," &c., recovered in any action or which any Commissioner shall be put to by virtue of the Act, shall be discharged "out of the moneys to arise by virtue of this Act, or other the goods and chattels vested in the Commissioners by virtue of their

cause.(a)—The commissioners are a fluctuating *body, with permanent and continuing functions, and with power to make [*110 contracts. The scheme of all Acts creating such a body is to assimilate the liability of the body to that of a corporation: *Kendall v. King*, 17 Com. B. 483 (E. C. L. R. vol. 84). If the commissioners cannot be sued on their contracts, there is no remedy at all at law; and that is the contention of the defendants, who rely upon *Bogg v. Pearse*, 10 Com. B. 534 (E. C. L. R. vol. 70). But that case, unless it turned upon the peculiar language of the statute there in question, is inconsistent with *Kendall v. King*.

Welsby and Spinks, contra.—So far as regards the salary, the present case is identical with *Bogg v. Pearse*. The only difference between stat. 9 G. 4, c. xxvi. s. 12(b) and stat. 8 & 9 Vict. c. clxxvi. s. 42,(c) is that stat. 9 G. 4, c. xxvi. s. 12 expressly enacts that the salaries shall be paid by the commissioners out of the funds to be raised under the Act, whilst in *Bogg v. Pearse* the Court of Common Pleas decided on the supposition that *stat. 8 & 9 Vict. c. clxxvi. s. 42 did so [*111 though by implication only. The principle of their decision was acted upon in *Addison v. The Mayor, &c., of Preston*, 12 Com. B. 108 (E. C. L. R. vol. 74). [CROMPTON, J.—Sect. 147 of stat. 9 G. 4, c. xxvi., provides that the amount recovered against the commissioners shall be paid out of the funds. May we not construe sect. 12 as to the salary in the same way?] By so doing, *Bogg v. Pearse* would be overruled; for sects. 36, 37, of stat. 8 & 9 Vict. c. clxxvii. afford the same argument for a similar construction of sect. 42.

So far as regards the bill of costs, the liability is that of the individuals who retained the attorney. It is so with overseers: *Chambres v. Jones*, 5 Exch. 229.†

Cur. adv. vult.

Lord CAMPBELL, C. J., on a subsequent day in this Term (May 6th), delivered judgment.

In this case the question is whether the defendant is liable to be sued by the plaintiff for services rendered by him to the Commissioners; 1st, as clerk, without an express agreement for the amount of salary; 2d, as clerk, with such agreement; 3d, as attorney employed by the Commissioners for purposes within the scope of their Act. And we are of opinion that he is liable on each of these accounts. If there had been

office, unless such action or suit, or any such damages or charges have arisen in consequence of wilful neglect or default on the part of the Commissioners incurring the same, or unless such action or suit have been defended without the order or direction of the Commissioners."

Sect. 38. In all actions "It shall be sufficient to state the names of any two of the Commissioners or the name of their clerk as the party plaintiff or defendant representing the Commissioners in any such action."

Sect. 39. Execution on a judgment in such an action shall be against the property belonging to the Commissioners by virtue of their office.

Sect. 42. "That the Commissioners shall from time to time appoint a treasurer, clerk, surveyor, collector and assessor, beadle, streetkeeper, and such other officers as they shall think fit, with such salaries and allowances as they think reasonable, and may remove such treasurer, clerk, surveyor, collector, assessor, beadle, streetkeeper and officers, and appoint others in their stead."

Subsequent clauses give the Commissioners power to execute works, and to make rates, and borrow money on mortgage of those rates.

(a) Before Lord Campbell, C. J., Erie and Crompton, Ja.

(b) See note (a) *antè*, p. 108.

(c) See the section, *suprà*.

E. B. & E.—6

no statute applicable, the Commissioners who personally employed the plaintiff would have been personally liable: but, as Commissioners are a fluctuating body, and so cannot conveniently be made parties, and as, when acting for public purposes under a statute with power over a fund created by the statute, they are not to be personally liable, therefore *112] this statute has followed the usual *course under these circumstances, and has enacted, by sect. 18, that the Commissioners shall be liable to sue and be sued in the name of the clerk or treasurer for the time being. The power to make contracts within the scope of the statute, and the incidents to suits for breaches of such contracts, are fully considered in *Kendall v. King*, 17 Com. B. 483 (E. C. L. R. vol. 84); and the law on the subject is there clearly laid down. If the contract is within such scope, the procedure for such breach is the same as in all actions on contract with all ordinary incidents, except that a nominal party represents the fluctuating body, and the execution on the judgment is modified. Therefore the substantial question is whether the contract here sued on is within the scope of the statute: and the answer is in the affirmative. Sect. 12 specifies the services of a clerk and "other officers" as requisite; and other sections, giving large and various powers for the exercise of which legal advice would often be required, by implication give the power of retaining an attorney; and, although there are several sections specifying powers of contracting in certain cases, there is no prohibition of contracts in cases not specified.

The defendant contends that the appointment of clerk, under sect. 12, either with or without a salary, is not a contract to remunerate, but creates a duty in the Commissioners to be enforced either by action on the case or by mandamus; and that, as the employment of an attorney is not one of the contracts expressly authorized or comprised within the general words of sect. 145, relating to contracts for buildings and other works of that description, there can be no contract; relying on *Bogg v. Pearse*, 10 Com. B. 534 (E. C. L. R. vol. 70). In that case *113] the Court of Common *Pleas held that a contract or debt did not arise as against succeeding Commissioners from their predecessors having appointed an officer at a salary under a power given them by statute. It being now settled by *Kendall v. King*, 17 Com. B. 483 (E. C. L. R. vol. 84), with the doctrine of which we entirely concur, that a body of the nature of the defendants in the present case are to be treated as a fluctuating body in the nature of a corporation, to be represented by their clerk, the reasoning of the court in *Bogg v. Pearse*, 10 Com. B. 534 (E. C. L. R. vol. 70), does not apply. Both Maule and Cresswell, Justices, during the argument in that case, relied on this point: the former saying, "How does the declaration show that the defendants are liable? the commissioners are not a corporation:" and the latter asks, "Are the present commissioners liable for the acts of former commissioners?" Mr. Justice Cresswell, in his judgment, also refers to the Act as authorizing the commissioners to appoint at a salary, observing that "it does not say that they shall *pay* it." In the present case sect. 12 of the Act directs the *payment* of the wages, salary, and allowances to be made by the commissioners. It is true that it says "out of the moneys to be raised:" but this may well be understood, in connection with the other part of the Act, to mean that the ultimate payment shall not be out of the private property of the commissioners,

but that, when judgment is obtained against the clerk, the rates are to be resorted to for its enforcement. And this seems the most probable construction in reference to the 18th section, where, in actions to be brought against the commissioners in the name of their clerk, the payment is ultimately to be made out of the rates. *In the present case, where the body is a fluctuating one in which, according to the doctrine established in *Kendall v. King*, 17 Com. B. 483 (E. C. L. R. vol. 84), the body is bound by contracts lawfully entered into, and where the commissioners are to appoint and pay the salary, we think that there was evidence of a contract, on such appointment at the salary, that the commissioners would pay it, just as if an ordinary individual or corporation appointed a servant or officer at a salary. The objection relied on by all the judges in *Bogg v. Pearse*, 10 Com. B. 534 (E. C. L. R. vol. 70), that there was only a power in the commissioners for the time being to appoint, and that no contract could be shown to arise against their successors merely from the appointment under that Act, does not seem to us to apply to the case now before us, for the reasons above given. We would add that we think the doctrine established in *Kendall v. King* a most wise and useful one, necessarily called for by, and resulting from, the modern legislation on this subject.

Our judgment, therefore, is for the plaintiff, for the whole amount claimed.

Judgment for the plaintiff.

*THOMAS WHITFIELD, GEORGE MOLINEUX, and
GEORGE WHITFIELD, v. The SOUTH EASTERN Rail- [*115
way Company. April 23.

A count against a railway company, being a corporation aggregate, for a malicious libel is good on demurrer; for a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice in law sufficient to support the action.

And, semble, there may be circumstances by which express malice in fact might be proved, such as to make a corporation aggregate liable therefor in its corporate capacity.

FIRST count. Averment: That the plaintiffs carried on business as bankers, issuing notes, under the firm of The Lewes Old Bank; and the defendants were the proprietors of, and, by their servants and agents, managed and conducted, a certain system of electric telegraph upon and along and over their line of railway for the purpose of enabling, and so as to enable, the defendants to transmit messages from one to another of their stations; "and the defendants from time to time transmitted messages thereby, and had the care and custody of all the messages transmitted. Yet the defendants, while the plaintiffs were such bankers as aforesaid and were such proprietors of and so carried on and managed the said Lewes Old Bank as aforesaid, and while such notes were so issued and outstanding as aforesaid, and while the plaintiffs so held and had such deposits and loans as aforesaid, and while the said stations or places were so connected by such telegraph as aforesaid, and before this suit, wrongfully, falsely, and maliciously, by means of the said telegraph, transmitted, and sent and published, from to wit Ticehurst Road Station

to wit to Hastings Station aforesaid, and there falsely and maliciously caused to be written, printed, copied, circulated, and published, the false, malicious, and defamatory words and message following, of and concerning," &c., "that *is to say, 'The Lewes Bank,' thereby then and *116] there meaning the said Lewes Old Bank, 'has stopped payment,' thereby then and there meaning and intending," &c. Then followed an innuendo. The 2d, 3d, and 4th counts were similar counts for transmitting to different stations by telegraphic messages of a similar purport. 5th count: "For that the defendants, while the plaintiffs were such bankers in copartnership as aforesaid, and such proprietors and managers of The Lewes Old Bank as aforesaid, and while such notes were so issued and outstanding as aforesaid, and such moneys were so lent to and deposited with the plaintiffs as aforesaid, and before this suit, to wit, by their agents and servants in that behalf, falsely and maliciously wrote and published, and caused to be written and published, of and concerning the plaintiffs, and of and concerning the said Lewes Old Bank, the false, malicious, and defamatory words following, that is to say, 'The Lewes Old Bank has stopped:'" with an innuendo. The 6th count was similar to the 5th, charging the defendants with publishing a malicious libel to the same effect but in different words. Then followed allegations of special damage applicable to the whole declaration.

Demurrer. Joinder.

Hugh Hill now (a) argued for the defendants.—The question is, whether a railway company, being a corporation aggregate, can in its corporate capacity be guilty of a libel. As a corporation aggregate is not capable of malice, no indictment for a crime in which malice is an essential ingredient can be supported against it. The case which has *117] gone furthest in extending the liability *of corporations is *Regina v. Great North of England Railway Company*, 9 Q. B. 315 (E. C. L. R. vol. 58). But there, whilst holding that a corporation aggregate were capable of obstructing a highway, and might therefore be convicted of that offence and fined, Lord Denman, C. J., in delivering judgment, says: "Some dicta occur in old cases: 'A corporation cannot be guilty of treason or felony.' It might be added 'of perjury, or offences against the person.' The Court of Common Pleas lately held that a corporation might be sued in trespass; (b) but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases." In *Eastern Counties Railway Co. v. Broom*, 6 Exch. 314,† it was held that a corporation might be guilty of false imprisonment, though a venire de novo was awarded on the ground of defective proof of authority: but in *Stevens v. Midland Counties Railway Company*, 10 Exch. 352,† where the action was for malicious prosecution, Alderson, B., gives his judgment "that an action of this description does not lie against a corporation aggregate; for, in order to support the action, it must be shown, that the defendant was actuated by a motive in his mind, and a corporation has no mind." It was not necessary to decide this, it is true; and the other Barons decide only on the ground that

(a) Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

(b) *Maand v. The Monmouthshire Canal Company*, 4 M. & G. 452 (E. C. L. R. vol. 43).

there was in that case no evidence against the corporation; but they do not express an opinion adverse to that of Alderson, B. [CROMPTON, J.—On this *demurrer you admit that, if by any possibility the corporation could be guilty, they are. You must therefore go [*118 so far as to say that, if the whole shareholders met and unanimously ordered, under seal if necessary, that matter injurious to a rival in trade should be published in order to injure him, no action lies.] An action, in such a case, would lie against the corporators as individuals, they being individually malicious, but not against the corporation in its corporate capacity, which in that capacity could not be malicious. The declaration would be bad if it did not show a malicious intent in the defendant: Com. Dig. *Action upon the Case for Defamation* (G. 5). In delivering the judgment of the Court in *Bromage v. Prosser*, 4 B. & C. 247 (E. C. L. R. vol. 10), Bayley, J., discussing the proof of malice necessary to support an action for slander, says: "Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse." And several other instances are given, all showing that the intention is an essential ingredient in legal malice. [Lord CAMPBELL, C. J.—No doubt, to constitute a crime, there must be intention. CROMPTON, J.—If the occasion was such as *prima facie* to justify the words, it may be a very grave question whether it is possible to prove express malice in a corporation. But, if a bookseller orders the publication of a book, which in fact is a libel though he does not know it, that intention to publish is sufficient legal malice to make him liable to an action for the libel. A corporation may give the same order *to publish.] But [*119 the individual is capable of the malicious intention to libel, whether his ignorance would or would not rebut the *prima facie* inference that he had such an intention. The corporation is not capable of having such an intention.

Creasy, contrà.—In *Bromage v. Prosser*, 4 B. & C. 247 (E. C. L. R. vol. 10), Bayley, J., proceeds to say: "And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. This is so laid down in *Styles* 392.(a) and was adjudged upon error in *Mercer v. Sparks*, Owen 51; *Noy* 35." A corporation may very well, in their corporate capacity, publish a libel and inflict injury on a person; indeed it has been proposed to establish a corporation of limited liability for the purpose of publishing a newspaper; and it surely would be monstrous to say that there would be no remedy against such a corporation for a libel. The objection, that it is criminal and that a corporation cannot be guilty of a crime, is

purely technical; and the way in which that technical objection has been
 *120] got rid of is *shown in the argument in *Regina v. Great North*
of England Railway Company, 9 Q. B. 315, 319 (E. C. L. R.
 vol. 58). That case carried the liability so far as that a corporation
 aggregate was held to be indictable criminally for a misfeasance. And
 since that time an action for assault and false imprisonment has been
 held to lie: *Eastern Counties Railway Company v. Broom*, 6 Exch. 314.†
 Even if it should be held that, in order to support the ordinary counts
 for libel, it is essential to show such malice as is impossible in a corpora-
 tion, and consequently that the last counts are bad, the first, second,
 and third counts show that the corporation carry on the business
 of transmitting messages by telegraph; if in the course of such a busi-
 ness they suffer an injurious message to become public, though merely
 by negligence, it is actionable.

Hugh Hill, in reply.—In the note (2) to *Craft v. Boite*, 1 Wms.
 Saund. 242 a, it is pointed out that the declaration must show a malicious
 intent in the defendant, though it is not necessary to use the word
 maliciously, at least after verdict. And there is no distinction here
 between the two sets of counts. The earlier counts do not allege
 negligence in transacting the message; and they do allege malice in
 publishing it. *Cur. adv. vult.*

Lord CAMPBELL, C. J., on a subsequent day in this Term (April 29th),
 delivered judgment.

The demurrer to the declaration in this case can only be supported
 on the ground that the action will not lie without proof of express
 *121] malice, as contradistinguished *from legal malice. But, if we
 yield to the authorities which say that in an action for defama-
 tion, malice must be alleged (notwithstanding authorities to the contrary),
 this allegation may be proved by showing that the publication of a libel
 took place by order of the defendants, and was therefore wrongful,
 although the defendants had no ill will to the plaintiffs, and did not mean
 to injure them. Therefore the ground on which it is contended that an
 action for a libel cannot possibly be maintained against a corporation
 aggregate fails. But, considering that an action of tort or of trespass
 will lie against a corporation aggregate, and that an indictment may be
 preferred against a corporation aggregate both for commission and
 omission, to be followed up by fine, although not by imprisonment,
 there may be great difficulty in saying that under certain circumstances
 express malice may not be imputed to and proved against a corporation.
 The authorities are collected and commented upon in *Regina v. Great*
North of England Railway Company, 9 Q. B. 315 (E. C. L. R. vol. 58),
 in which it was held that a corporation aggregate may be indicted for
 cutting through and obstructing a public highway; and again in *Eastern*
Counties Railway Company v. Broom, 6 Exch. 314,† in which it was
 held, in error, that an action of trespass may be maintained against a
 corporation aggregate for an assault committed by their servant author-
 ized by them to do the act. The cases to the contrary will be found to
 turn upon the defective evidence to prove the authority of the corpora-
 tion to do the act complained of. Instances might easily be suggested
 where great injustice would be suffered by individuals if their remedy
 *122] for wrongs authorized by *corporations aggregate were to be
 confined to the agents employed.

Therefore, without adverting to the second point made by Mr. *Creasy*, that at any rate some of the counts impute negligence to the defendants in the mode of working their telegraph, we think that there ought to be judgment for the plaintiffs. Judgment for the plaintiffs.(a)

(a) In the Quo Warranto in *Rex v. The City of London*, 8 How. St. Tr. 1039, in the second replication, set out at pp. 1305, 1309, the Attorney-General averred that The Mayor, Commonalty, and Citizens of the city of London, in their common council assembled, unlawfully, maliciously, advisedly and seditiously, and without lawful authority, took upon themselves to censure and judge the King, and voted that a petition should be exhibited to the King. And that The Mayor, Commonalty, and Citizens of the city of London aforesaid, in common council aforesaid, as aforesaid assembled, unlawfully, maliciously, advisedly and seditiously, and with the intent that the said petition should be published and dispersed among the subjects of the said Lord the now King, to lead them into the opinion that the said Lord the now King, by the prerogation of Parliament aforesaid, had obstructed the public justice of the realm, and to incite the same subjects of, &c., to hatred of the said Lord the King and of the government in this realm established, and to the disturbance of peace, then and there ordered the said petition, so containing the seditious and scandalous matter aforesaid, to be printed, and afterwards, to wit on, &c., the said petition, with the intent that it should be published and dispersed among the subjects to alienate and divert their affections from the said Lord the now King and his government, did maliciously, advisedly, and seditiously, print and cause to be printed and published, in contempt of the Lord the now King, to the exciting of sedition, and the pernicious example of others in like case offending: whereby The Mayor, Commonalty, and Citizens had forfeited their franchises, including that of being a corporation. On demurrer to the rejoinder to this part of the replication, judgment was given for the Crown. It is obvious that that very profound lawyer Saunders, who, it is said, advised and drew the pleadings in this case, and certainly as Chief Justice assented to the judgment on demurrer for the Crown, would not have admitted that it was a legal absurdity to charge a corporation aggregate with maliciously publishing a libel. See the argument as to the legality of the judgment in that case, 2 Kyd's Treatise on the Law of Corporations 474.

The principal case was followed in *Green v. The London General Omnibus Co.*, 29 L. J. C. P. 13; 6 Jurist, N. S. 228; 1 Law Times, N. S. 95; where an action against a corporation established for running omnibuses, for wrongfully and maliciously placing and running their stages so as to obstruct and interfere with those of the plaintiff, was sustained. "I take the whole tenor of the authorities to show," said Chief Justice Erle, "that an action for a wrong does lie against a corporation, where the act of the corporation—the thing done—is within the purpose of the incorporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual." The old doctrine, that a corporation aggregate is not capable of malice, may therefore be considered as abandoned in Eng-

land. On the authority of the principal case, also, it was held in *Philadelphia, Wilmington, &c., Railroad v. Quigley*, 21 Howard 202, 212, 223, that an action for a libel might be maintained against a railroad corporation, though the alleged libel was originally contained in a report to its shareholders, which was subsequently published by order of the board of directors. See also, as to the liability of corporations for malicious wrongs: *Merrill v. The Manufacturing Co.*, 10 Conn. 384; *Goodspeed v. East Haddam Bank*, 22 Conn. 530.

In *The New York, &c., Telegraph Co. v. Dryburg*, 35 Penn. St. 298, it was held that a telegraph company are liable to a third person for an injury caused by a negligent transmission of a telegram over their lines.

*123]

*CARR v. STRINGER. *April 23.*

No appeal lies, under stat. 13 & 14 Vict. c. 61, s. 14, to this Court from the decision of a county court on an interlocutory matter, such as the taxation of costs under stat. 19 & 20 Vict. c. 108, s. 34. An appeal on such a matter having been brought, this Court refused to hear the point argued, on the ground that they had no jurisdiction to decide such a point, but entertained the appeal so far as to dismiss it with costs.

APPEAL from the decision of the judge of the county court of Yorkshire, holden at Wakefield, against the defendant, as tenant of land, for felling and converting to his own use certain trees of the plaintiff growing upon the land demised. The plaintiff claimed, for the damages he had thereby sustained, the sum of 25*l*. The cause was tried on the 15th September, 1857, in the Wakefield county court, with a jury, who gave their verdict for the plaintiff for 15*l*. A bill of the plaintiff's costs was made out after the trial of the cause by the plaintiff's attorney, in accordance with the scale of costs framed by the five county court judges and allowed by the Lord Chancellor, pursuant to stat. 19 & 20 Vict. c. 108, s. 33: and this bill was taxed and allowed between the party and party by the registrar of the court in accordance with that scale, amounting to the sum of 12*l*. 9*s*. 6*d*. At the county court held at Wakefield in November, 1857, the defendant, by his attorney, applied, under sect. 34 of stat. 19 & 20 Vict. c. 108, to have the said taxation reviewed, on the ground that the allowances therein by the registrar were made upon too high a scale, namely upon the scale framed for actions on claims exceeding 20*l*., whereas, as only 15*l*. was recovered by the plaintiff, the same ought to have been made upon the scale applicable to claims not exceeding 20*l*. The plaintiff's attorney, on the other hand, contended that the sum actually recovered was not always

*124] to be taken by the registrar as his guide *in the taxation of costs; but that in all actions since stat. 19 & 20 Vict. c. 108, where more than 20*l*. is claimed, the allowances were to be made in accordance with the scale of costs framed as before mentioned upon that Act; and he referred to sects. 33 and 34. The question was adjourned to the 18th November, 1857; when the judge decided that the costs ought not to have been taxed upon the higher scale, and directed the registrar to retax them upon the scale applicable to actions where the sums claimed do not exceed 20*l*., as he thought the word "claimed" in the 33d section must be construed to mean "rightfully claimed;" for that otherwise any plaintiff, whose real demand was only 40*s*., might, by wrongfully claiming 40*l*., make the defendants pay costs amounting to 15*l*. or 20*l*.; and he referred to several decisions as to costs under Court of Requests Acts in support of this construction of the Act, namely *Drew v. Coles*, 2 Cr. & J. 505;† *Cross v. Collins*, 5 New Ca. 194 (E. C. L. R. vol. 35); *Baddley v. Oliver*, 1 Cr. & M. 219;† *Fairbrass v. Pettit*, 12 M. & W. 453.† It was argued by the plaintiff's attorney that the injustice pointed at by the judge might in all cases be remedied by the exercise of his discretion in awarding the plaintiff less costs than what he was entitled to by the Act. The judge stated that, if his construction of the Act was right, he had no discretion in the matter; adding that, if he thought he had, he should have given the plaintiff his full costs. From the above decision the plaintiff appealed. The defendant's attorney protested against the plaintiff's right to appeal, and refused to

settle the case on behalf of the defendant. The case was therefore settled by the judge of the county court. The question for the opinion of this Court is: Whether the *plaintiff's costs and charges in [*125 the above action ought, or ought not, by law to be taxed on the said scale framed by the five county court judges, and allowed by the Lord Chancellor, for actions where the debt or damage claimed exceeds 20*l*.

Manisty appeared for the appellant, and read the paper-book as above set forth. [Lord CAMPBELL, C. J.—Has this Court any jurisdiction to review the decision of the county court on such a point?] Stat. 13 & 14 Vict. c. 61, s. 14, gives an appeal when either party in any cause is dissatisfied with the determination of the Court in point of law, or the admission or rejection of any evidence. [Lord CAMPBELL, C. J.—That is on a decision of the cause. This is but an interlocutory proceeding, on which no appeal lies; and we have no jurisdiction. We cannot, therefore, have the point argued or pronounce any judicial opinion. But it may be satisfactory to the judge of the county court to know that, as private individuals, who have not heard the case argued, we all think his decision right.]

Gray, for the respondents, applied for costs.—Though the Court has no jurisdiction to decide the point, it has jurisdiction to entertain the appeal so far as to examine whether it had jurisdiction, and to give costs to the respondent, who was brought here without his fault.(a)

Per CURIAM.(b)

Appeal dismissed, with costs.

(a) See *Regina v. Padwick*, 8 E. & B. 704 (E. C. L. R. vol. 92).

(b) Lord Campbell, C. J., Wightman, Erie, and Crompton, Js.

*EVELYN, Appellant, *v.* WHICHCORD, Respondent. April 24. [*126

Under sect. 51 of The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), an owner of land in fee simple who lets it on a building lease at a peppercorn rent is not liable, as owner, to the surveyor for fees in respect of buildings afterwards erected on such land, a peppercorn rent not being within the meaning of the words "of the whole or of any part of the rents or profits of any land or tenement" in the interpretation clause, sect. 3.

THIS was a case stated by a magistrate of the Metropolitan Police District, under stat. 20 & 21 Vict. c. 43.

The case set out a summons, dated 5th January, 1858, addressed to William John Evelyn, the appellant. The summons recited a complaint made, on that day, before the magistrate, by the respondent, John Whichcord, surveyor of the District of Deptford: "For that you, on" 11th August, 1857, in the parish of St. Paul, Deptford, in Kent, "and within the said District, did unlawfully refuse payment of the sum of 10*l*. 15*s*. to him, the said John Whichcord, being the amount of fees due to him as such District surveyor, for surveying six houses, situate as aforesaid, of which you were then the owner." The summons then commanded the appearance of the appellant.

Upon the hearing, it was agreed that the following statement of facts should be taken as proved.

That the complainant, as District surveyor, is entitled to be paid a

fee upon each of the six houses in the complaint mentioned, making together the sum of 10*l.* 15*s.*

That William Thomas Searle was the builder of the said houses on his own account; and that the land upon which they are built belongs in fee simple to the defendant.

That, by a memorandum of agreement, dated 7th August, 1856, the *127] defendant agreed to let, and Searle *agreed to take, the land in question for the term of eighty-one years, from 29th September, 1856, at a peppercorn rent for the first year, 6*l.* for the second year, and 12*l.* per annum for the remainder of the said term; Searle undertaking to erect thereon six good fourth-rate dwelling-houses in accordance with the provisions of The Metropolitan Building Act; and the defendant undertaking, upon the due completion of such houses, to grant to Searle, or his nominee or nominees, a lease or separate leases of the said land, and of the several messuages to be erected thereon, for the residue of the said term of eighty-one years, and to apportion the said ground-rent in the event of separate leases being granted.

That afterwards, and before the surveyor's fees became payable in respect of the said houses, Searle obtained a loan of 500*l.* on mortgage of the said land and buildings then in progress of erection thereon: and it was provided by the mortgage-deed that, in default of repayment of the mortgage-money, the mortgagees should be entitled to apply to the defendant for a lease or leases of the said land and buildings hereon to themselves, as nominees of Searle: and notice of this mortgage was duly given to the defendant.

That, after completion of four of the said houses, two of them were, with the consent of the mortgagees, sold by Searle to John Church, to whom, as nominee of Searle, a lease of those two houses for the residue of the term of eighty-one years, at an apportioned ground-rent of 5*l.*, was granted by defendant.

That, at the time of such sale, the surveyor's fees in respect of these two houses remained due and unpaid.

That afterwards, and subsequently to the time when the fees on all *128] the said six houses became due and *payable, Searle became bankrupt; and assignees of his estate and effects have been duly appointed.

That no proceedings have been taken to recover payment of the fees for the said six houses, or any of them, either from Searle before his bankruptcy, nor from his assignees since his bankruptcy, nor to recover from Church the fees due in respect of the two houses purchased by him.

That the proceedings required by law have been duly taken against defendant for the recovery of the fees upon the said six houses, if he is legally liable to the payment thereof, or of such part thereof as he is liable to pay.

Upon this state of facts, it was objected, on the part of the defendant:

First, that, as by the agreement for a lease to Searle defendant was entitled to a peppercorn-rent only for the first year, he did not come within the meaning of the word "owner," as expressed in the interpretation clause of The Metropolitan Building Act, 1855, viz., "'owner' shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the

occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will."

Secondly, That, even supposing defendant did come within the meaning of the word "owner" as is expressed, he was not liable to the payment of the surveyor's fees, except on default made by the persons previously mentioned in the Act, viz., the builder and the occupier, against whom proceedings for the recovery of the fees must first be taken.

The case then stated:

"With regard to the former of these objections, I was of opinion that the defendant did come within the meaning of the word 'owner,' as expressed in the Act, notwithstanding that the money rent reserved to him by the agreement for a lease was not immediately payable. [*129

"And, with regard to the latter objection, I was of opinion that the Act of Parliament intended to give the district surveyor a prompt and direct mode of recovering his fees, not only as against the builder, but as against the other persons substantially interested in the due execution of the works, subject to his supervision, and therefore benefited by his services: and that, so far as regards his right to the recovery of his fees, no priority of liability exists."

The magistrate thereupon ordered the appellant to pay the 10*l.* 15*s.* to the respondent, in respect of the six houses, together with the costs. The appellant then appealed.

C. Clark, for the appellant.—The refusal, which is the subject of the summons, appears from the case to have taken place in August 1857. But at that time no fees had become due from the appellant. The claim is made under The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122). Sect. 51 entitles the surveyor "to receive the amount of fees due to him from the builder employed in erecting such building, or in doing such work, or in doing any matter in respect of which any special service has been performed by the surveyor, or from the owner or occupier of the building so erected, or in respect of which such work has been done or service performed." For the respondent, it is contended that the appellant was the "owner" of the building. *He was indeed owner of the fee simple of the land on which the building was erected: but he was not owner of the building, nor indeed of the land in the sense in which the word "owner" is here used. By sect. 3 "owner" shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will." Now, till after 29th September, 1857, the appellant was not entitled to any part of the rents or profits: for the year expiring on that day he was to receive only a peppercorn rent. The object of the Act was to require that buildings should be erected so as to secure the public safety: and for this reason the person substantially interested, and the builder (who is here not the owner), are looked to by the Legislature. Other sections of the Act confirm this view. By sect. 72, in the case of a structure being in a dangerous state, notice is "to be given to the owner or occupier of such structure," requiring him to take it down or secure it. By sect. 73 "the owner, or, on his default, the occupier, of [*130

any such structure" may be ordered by the justice to take down, &c.; and, if he does not do so, the commissioners may do it; and all expenses incurred by the commissioners in respect of a dangerous structure "shall be paid by the owner of such structure." By sect. 74, if "such owner" cannot be found, the commissioners may sell the structure, pay the expenses out of the proceeds, and return any surplus "to the owner." By sect. 76, if the surplus is not claimed by the owner, it is to be paid into the account of the Accountant-General, "to the credit of the *131] owner," to be paid out to "the owner" on "his petition. These provisions are quite unintelligible if applied to a person who has only the reversion in fee, and receives a mere nominal rent, having no control whatever over the structure. [Lord CAMPBELL, C. J.—It does seem that, in point of justice, the party interested in the structure should pay the expenses.] Accordingly, the statute clearly contemplates payment by no one else. Sect. 82, which regulates the expenses in respect of party structures, speaks only of the "building owner" and "adjoining owner:" and the preliminary definition in sect. 82 defines these as "owners of the premises" respectively, clearly meaning the structures. [CROMPTON, J.—Could a ground-rent of a peppercorn be part of "the rents or profits" of the land, within the meaning of sect. 3?] Clearly not: the rent or profit must arise from the structure. An interpretation clause is not to receive so rigid a construction as to disturb the application obviously intended by the Legislature. Lord Denman, in *Regina v. The Justices of Cambridgeshire*, 7 A. & E. 480, 491 (E. C. L. R. vol. 34), says: "It is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term, where the circumstances require that they should." So, in construing a will, Sir W. Grant, M. R., said: "There is no reason why the same words may not be differently construed, when they apply to different descriptions of property, governed by different rules:" *Elton v. Eason*, 19 Ves. 73, 77.

Winston, *contra*.—The owner of the fee simple is, properly speaking, *132] owner of the land and all buildings *upon it. And this is quite consistent with sect. 3; for the owner of the fee simple takes the rent, though, in the present instance, such rent is merely nominal. The question cannot be one of degree. It might well happen that no other owner could be found. [CROMPTON, J.—I cannot think that this ground-rent is part of the rents and profits. ERLE, J.—There may be no other profits.]

C. Clarke, in reply.—The whole case for the respondent rests on the word "rents." But that word must be construed with reference to the other enactments, which, as has been shown, confine the meaning to persons beneficially interested in the structure.

Lord CAMPBELL, C. J.—I think the appellant is not liable to these payments. He is not an owner within the definition in sect. 3. Certainly he is not occupier; and he can be charged as owner only in respect of his being in receipt of part of the rents and profits: but it seems to me that he is not in such receipt within the meaning of the clause. No rent really comes to him: he has only a peppercorn rent, but receives no profits. We could not hold him liable, unless every-

body who grants a building lease is to be liable to the surveyor in respect of his ultimate reversion. To impose such a liability would be oppressive and unjust, and entirely unnecessary. I am of opinion that it is what the legislature did not mean.

(WIGHTMAN, J., was absent.)

ERLE, J.—Under the peculiar circumstances of this case, I read the statute as my Lord does.

*CROMPTON, J.—My impression is the same way. These [*133 interpretation clauses are often the parts of the Act most difficult to be understood. I am not satisfied that the appellant here was in possession of the rents and profits. It is difficult to say that the Act does not point to either an occupation or a beneficial possession of rents and profits. Clearly the appellant was not in occupation. Was he then in possession of any part of the rents or profits? I think the Legislature meant that a person should be understood to be in such possession who, by himself or his tenant, received either the rent or the profit. In old time, a man had the esplees by taking either the produce of the land or the rent. A peppercorn cannot be either rent or profits. Though the words “any part of the rents or profits” are used, I think they mean only a part of a whole which is rent; that which a man might recover. A peppercorn rent is not within the meaning.

Appeal allowed.

GREIG, Appellant, v. BENDENO, Respondent. *April 24.*

By a local police Act (5 & 6 Vict. c. cvi., for Liverpool), a penalty is imposed, recoverable before a justice, on any person keeping a shop where refreshment is sold, not being a licensed victualler or licensed to sell beer by retail to be drunk on the premises, if he knowingly permit disorderly conduct in such shop, or knowingly suffer prostitutes to meet together and remain therein.

Held that, if the justice infers, from prostitutes coming together to such shop, that they have in fact met for purposes of prostitution or other disorderly conduct, he should, whether there has been actual disorderly conduct or not, convict the owner of the shop who has knowingly permitted this: but not otherwise.

Therefore, where, on appeal and case stated, it appeared that it had been proved before a justice that an owner of such shop had knowingly permitted prostitutes to meet and remain there, that refreshments were there sold, and that no disorderly conduct had been proved to have taken place there, and the justice had refused to convict, the court dismissed the appeal against his decision.

This was a case stated by a justice of Liverpool under stat. 20 & 21 Vict. c. 43.

*Joseph Bendeno was summoned before the magistrate upon an information and complaint laid by John James Greig, the [*134 chief of the Liverpool police force, and which charged the defendant: “For that he, being then and there a person keeping a shop where refreshment was and is consumed, in a certain street in the borough of Liverpool, called Lime Street, and not being a licensed victualler or a person licensed to sell beer by retail to be drunk on the premises, did then and there knowingly permit prostitutes to meet together and remain in his said shop in Lime Street, contrary to the statute in that case

made and provided." The alleged offence is created by the Local Act, &c., 5 & 6 Vict. c. cvi.(a)

By sect. 251 of that Act it is enacted: "And whereas it is expedient that provision should be made by law for preventing disorderly conduct in houses of public resort kept by persons not being licensed victuallers, or licensed to sell beer by retail to be drunk on the premises; be it enacted, that every person not being a licensed victualler, or a person licensed to sell beer by retail to be drunk on the premises, who shall have or keep any house, shop, room, cellar, or vault, or place of public resort within the borough, wherein ready-made tea or coffee, provisions, liquors, or refreshments of any kind, shall be sold or consumed (whether the same shall be kept or retailed therein or procured elsewhere), and who shall wilfully or knowingly permit drunkenness or other disorderly conduct in such house, shop, room, or place, or knowingly suffer any unlawful games or any gaming whatsoever therein, or knowingly permit or suffer prostitutes or persons of notoriously bad character to meet *135] together and remain therein, shall for every such offence be liable to a penalty not more than 5*l*.(b)

The case stated as follows.

"The parties appeared before me upon the summons; and I heard the case. Having heard it, I find that the shop of the defendant has been for some time kept by him as a coffee shop, and is frequented chiefly by prostitutes. I find that, on the night in question, the defendant did knowingly permit twenty prostitutes to meet together, and remain in his said shop, together with a number of men; and that he allowed prostitutes to remain there after having been warned by a policeman that they were prostitutes, and after having stated that he knew them to be so. I also find that coffee and other refreshments were sold and consumed in the said shop; and that the defendant was not a licensed victualler or a person licensed to sell beer by retail to be drunk on the premises. I also find that there was no disorderly conduct proved to have taken place in the said shop, either on the part of the said prostitutes or any other person.

"I was of opinion that the offences mentioned in the latter part of the 251st clause were controlled by the words at the commencement of it; and that, without proof of disorderly conduct, I ought not to convict the defendant; and accordingly I dismissed the summons."

The question was stated to be, Whether the magistrate was bound to convict.

*136] *Monk*, for the respondent.—The question is, whether the magistrate was bound to convict on the facts stated. It cannot be that the legislature intended to punish a shopkeeper for allowing persons whom he knew to be prostitutes to obtain refreshment. From the whole section it appears that what the enactment is directed against is disorderly conduct. But the case does not show that this had occurred: and it does not even appear that there was any reason to apprehend it.

(a) Local and personal, public: "For the improvement, good government, and police regulation of the borough of Liverpool."

(b) Sect. 330 makes the penalties imposed recoverable upon summons and conviction before a justice (of the borough, including the police magistrate, sect. 357), if the recovery be not otherwise provided for.

The Court then called on

Brett, for the appellant.—The provision in the Local Act is practically much the same as that in The General Licensing Act, 9 G. 4, c. 61, s. 13, and Schedule C.(a) There has been a difference of opinion, amongst magistrates, as to the effect of such provisions: and this appeal is brought for the purpose of having the question settled. The enactment must have meant to go beyond merely punishing actual disorderly conduct: no special provision would have been necessary for this. The finding shows that the prostitutes remained in the shop for more than the temporary purpose of obtaining refreshment. The question on which information is desired is, whether the permitting prostitutes to assemble under such circumstances is an offence within the Act.

Monk was heard in reply.

Lord CAMPBELL, C. J.—I can look only at the facts found: and they are consistent with the supposition that the prostitutes were in the shop for lawful purposes, and did not remain longer than was necessary for such *purposes. It is not necessary, in order to bring a case [*137 within the Act, that there should be actual disorderly conduct. The object was to prevent it as well as to suppress it: and the keeper of the shop would be liable to punishment if he encouraged or tolerated an assembling which had such a purpose in view.

(WIGHTMAN, J., was absent.)

ERLE, J.—I am clearly of opinion that the magistrate has ample discretionary power as to enforcing this Act. If such women come together for the purpose of prostitution, or if thieves come together for their unlawful purpose, the magistrate has power to convict. But the keeper of the shop is not to be convicted for allowing a couple of unfortunate women to remain long enough to obtain a cup of coffee and drink it. I therefore answer the question put by saying that the magistrate was not bound to convict.

CROMPTON, J.—I quite agree that, upon the facts found to be proved, the magistrate was not bound to convict. He was bound to see whether the evidence satisfied him that the women came together for the purpose of prostitution or disorderly conduct. It is a pure question of fact for him: he was bound to convict if he thought they came for that purpose: and to that extent, perhaps, I should be disposed to qualify what I understood my Lord to say. At first I inclined to suppose that the case asked us whether the magistrate's power to convict was taken away by there having been no disorderly conduct in fact: but we all agree that it is not necessary, for the exercise of his power, that there *should [*138 be actual disorderly conduct. It is a matter of some delicacy for the magistrate to determine: I think he should not look too nicely at the fact of women coming into a shop for refreshment.

Appeal dismissed.

(a) See, as to this, *Regina v. Ashton*, 1 E. & B. 286 (E. C. L. R. vol. 72). As to beerhouses, see the Schedules to stats. 11 G. 4 & 1 W. 4, c. 64, and 4 & 5 W. 4, c. 85.

RICHARDSON, Appellant, v. GLADWIN and GOODAY, Respondents. *April 24.*

Where the Small Tenements Act, 13 & 14 Vict. c. 99, has been adopted in a parish, the owner of a tenement of a value not exceeding 6*l.*, who has been assessed to the poor-rate instead of the occupier, is, by virtue of Sturges Bourne's Act, 58 G. 3, c. 69, entitled to vote at all vestry meetings in respect of such tenement: but the occupier has no such vote. But, for whatever number of tenements such owner is assessed, he can, at the utmost, give no more than six votes, the restriction in sect. 3 of stat. 58 G. 3, c. 69, being applicable.

THIS was a case stated by justices under stat. 20 & 21 Vict. c. 43.

Daniel Richardson, the appellant, a parishioner of Great Leighs in Essex, and one of the people called Quakers, was summoned to appear before Samuel James Skinner, Esquire, and The Reverend Andrew Douglas Stacpoole, two justices of Essex, in petty sessions assembled, on 12th February, 1858, to answer a complaint by William Gladwin and Thomas Gooday, the respondents, the churchwardens of the said parish of Great Leighs, for non-payment of the sum of 1*l.* 19*s.* 6*d.*, assessed on him for a church-rate made for the said parish on 19th November, 1857. The defendant did not appear in answer to the summons: whereupon the summons was duly proved. And Mr. John Copland, as attorney for defendant, appeared before the said justices and disputed the validity of the rate. Whereupon the justices proceeded to hear and determine the same, under the provisions of the following statutes: 7 *139] & 8 *W. 3, c. 34; 2 stat. 1 G. 1, c. 6; 58 G. 3, c. 127; 5 & 6 W. 4, c. 74; 4 & 5 Vict. c. 36.

It appeared from the vestry minute book, and was proved in evidence, that a vestry meeting for making a church-rate was duly convened and held on 19th November, 1857; that a considerable number of the parishioners attended the same; that a necessity was shown to exist for making a rate; that a rate of 2*d.* in the pound was duly proposed and carried on a show of hands; that a poll was demanded; which was duly taken; and that the chairman declared the result of such poll to be:

For the rate 57 votes.

Against the rate 46 votes.

Whereupon he declared the rate to be carried; and a rate of 2*d.* in the pound was produced and signed accordingly.

It further appeared that stat. 13 & 14 Vict. c. 99, "For the better assessing and collecting the poor-rates and highway-rates in respect of small tenements," had been adopted and was in force in the parish. That, by virtue thereof, the owners of all the cottages in the parish, the yearly rateable value whereof does not exceed 6*l.*, were and are rated and assessed to the rates for the relief of the poor instead of the occupiers thereof: that the actual occupiers of such small tenements are not rated or assessed in the poor-rates, but appear in such rates as occupiers only of the tenements in respect of which the owners are rated; that all such occupiers are assessed in the said church-rate, and are liable to pay the same.

It further appeared that several of the owners of such small tenements *140] claimed to vote on the poll in the matter of such church-rate by virtue of stat. 13 & 14 Vict. c. 99, s. 6, and tendered one vote for each separate tenement whereof there appeared to be a separate occupier, over and above the votes which they were entitled to give in

respect of their own personal occupations; one of such owners having tendered twenty-four votes in respect of twenty-four such small tenements, another sixteen votes, and others a lesser number. That the chairman caused such votes to be recorded as tendered, but refused to allow them as valid, or to reckon them in the poll. If the chairman had allowed and reckoned the votes tendered by the owners of such small tenements on the before-mentioned principle of one vote for each tenement in each separate occupation, he would have declared the result of the poll to be:

For the rate 91 votes.

Against it 98 votes.

And in such case the majority of votes would have been against the rate.

It further appeared that several of the occupiers of such small tenements, although not assessed to, but named as occupiers in, the poor-rate, personally attended the poll, and tendered votes in respect of their individual occupations. That the chairman caused such votes to be recorded as tendered, but refused to allow them as valid, or to reckon them in the poll. If the chairman had allowed and reckoned the votes tendered by the occupiers of such small tenements, he would have declared the result of the poll to be:

For the rate 58 votes.

Against it 72 votes.

And in such case the majority of votes would have been against the rate.

*It further appeared that the rate in question had been duly demanded of the defendant, who had refused to pay the same; and [*141 that he was and is one of the people called Quakers.

The justices considered that the church-rate sued for was good and valid, and made an order on the defendant for payment of the amount claimed, with costs; which order has been duly served upon the defendant.

The defendant being dissatisfied with the said determination, as being erroneous in point of law, did thereupon apply in due time to the said justices to state and sign a case for the opinion of this Court: and the said justices accordingly stated and signed this case, and submitted the following as the grounds of such their determination.

"1. That on the true construction of the statute 13 & 14 Victoria, chapter 99, no person simply as being the owner of small tenements, and being rated as therein mentioned, has any right to vote in respect of such tenements on any question of church-rate, or on any other question except such as may arise in carrying into execution the laws for the relief of the poor.

"2. That, if such owner have the right to vote in vestry in respect of such tenements on any question of church-rate, he is not entitled to give separate votes for each separate tenement, where the effect of such a principle or mode of voting would give him more than six votes in the whole, including such votes as he may be entitled to give as an occupier in respect of other property.

"3. That, under the statute 58 George 3, chapter 69, and the subsequent Acts amending the same, or otherwise, no parishioner or other person is entitled to vote *in or at any vestry who is not assessed or liable to be assessed to the rates for the relief of the poor. And that, [*142

consequently, the occupiers of small tenements in parishes in which the said Act of 13 & 14 Victoria, chapter 99, is in force, although named in the poor-rate as occupiers, have no right to vote in vestry on any question whatever.

"4. That for these reasons the chairman of the vestry was right in rejecting the votes which he so rejected; and that the said church-rate was duly made in vestry by a majority of the parishioners, and was in other respects good and valid."

Hayes, Serjt., for the respondents.—First, the occupiers of tenements of which the rateable value was under 6*l.* had no right to vote. As stat. 13 & 14 Vict. c. 99 is in force in the parish, the owners, and not the occupiers, of such tenements were rateable to the poor-rate. That being so, these occupiers could not vote in vestry, by stat. 58 G. 3, c. 69, commonly called Sturges Bourne's Act, sect. 3 of which gives the right of voting in vestry only to inhabitants who are rated or rateable to the poor-rate. Stat. 59 G. 3, c. 85, s. 1, extends this to persons who are rated, though not inhabitants. These last-mentioned two statutes regulate the voting in vestry, and entirely supersede all earlier law on the same matter. The preamble of stat. 58 G. 3, c. 69, recites that "it is expedient to regulate the manner of holding parish vestries, and the right of voting therein:" and sect. 1 prescribes the giving of notices: sect. 2 makes regulations as to the chairman, and the entering of minutes; sect. 3 lays down the qualification before mentioned; sect. 4 provides for the case of inhabitants who have come into *the parish *143] since the last rate: and the whole Act was clearly passed with the view of prescribing general rules for all vestries. That this rule is that which determines the right of voting for or against church-rates was decided by Sir Herbert Jenner Fust, in *Ranson v. Campkin*, 2 Rob. Ecc. Ca. 370, 393; and it may be inferred from *Faulkner v. Elger*, 4 B. & C. 449 (E. C. L. R. vol. 10), that it is immaterial whether a party qualified under stat. 58 G. 3, c. 69, be or be not liable to church-rates. Then the effect of stat. 13 & 14 Vict. c. 99, is, upon the adoption of the Act by the parish, to give the qualification, incident to rateability to poor-rate, to the owner of tenements of less rateable value than 6*l.*, and to take it away from the occupier; for it makes the former liable to the poor-rate and exempts the latter. Sect. 6 expressly enacts "that every such owner so rated as aforesaid shall have the same right of appeal (subject to the same conditions) against rates, and the same right to vote in vestry, as if he were an occupier duly rated in respect of the same tenement." This, also, is conclusive as to the second point. If the owners were duly rated occupiers they would, by stat. 58 G. 3, c. 69, s. 3, have one vote for a rated rent not amounting to 50*l.*, and an additional vote for every additional 25*l.*, limited by the restriction that they could have no more than six votes in all. It is contended that stat. 13 & 14 Vict. c. 99, applies only to poor-rates and highway-rates; and that is so: but, by regulating the rateability to the poor-rate, it regulates also the qualification to vote in vestry. Where the rateability is put an end to, the franchise is necessarily destroyed, unless where it is expressly preserved, as the franchise of parliamentary electors is preserved to burgesses, freemen, and *liverymen by stat. 14 & 15 *144] Vict. c. 39; which enactment would have been unnecessary unless the non-rateability to the poor had (by virtue of stat. 2 & 3 W.

4, c. 45, s. 27), the effect, in default of express provision, of destroying a qualification depending on the rateability. (a)

Lush, contra.—At common law every parishioner paying scot and lot was entitled to vote at the vestry: 1 Burn's Ecc. L. p. 415 k (9th ed., by Phillimore), tit. *Churchwardens [and Vestry]*. Stat. 58 G. 3, c. 69, had, by mistake, limited the voting to inhabitants paying the poor-rate on a certain amount of property. The effect would have been to disfranchise parties who, though not inhabitants, were rated to the poor. This was corrected by stat. 59 G. 3, c. 85, s. 1. The intention of stat. 58 G. 3, c. 69, was, not to disfranchise, but to increase the number of votes upon a definite amount of rated property. [CROMPTON, J.—Was not the intention to make the right depend upon being rated to the poor-rate?] The poor-rate is made the test of the amount of qualification. [ERLE, J.—Has any inhabitant been admitted to vote at vestries, since that statute, who has not been rated to the poor? Lord CAMPBELL, C. J.—I thought it an irresistible argument that sect. 4 would not have been needed unless rateability to the poor had been previously made the qualification. ERLE, J.—What does "scot and lot" mean?] It would include "church scot." (b) This question could not have arisen before stat. 13 & 14 Vict. c. 99, because there would have been no inhabitant not rateable to the poor. [ERLE, J.—Stat. *58 G. 3, c. 69, defines those who are to vote at vestries, not [*145 those who are to vote for poor-rates.] But for the 3d section, there would have been no plurality of votes: this indicates the general intention of the Act. Sect. 5 would be inapplicable to a party who was not assessed at all. There are no words in the Act disqualifying such persons. The occupiers of these small tenements are liable to the church-rate: and it is but reasonable that all who are to contribute to such a rate should have a voice in determining whether there shall be a rate or not. In this respect the church-rate differs from the poor-rate, as to which those who are to pay it have no choice. Further, stat. 13 & 14 Vict. c. 99 does not even exempt the small tenements from the poor-rate. The object of the Act, according to the preamble, is "to make better provision for the rating of such tenements, and for the collection of such rates." In the result, the only change made is in the mode of collecting. By sect. 5 the rates may be levied on the goods of the owners and recovered from them; but, also, the goods and chattels of the occupiers are still liable to distress. Further, stat. 13 & 14 Vict. c. 99 applies only to poor-rates and highway-rates: the occupiers of the small tenements will still be liable to be assessed to all other parochial rates. Next, the owner is entitled to a vote in respect of each tenement for which he is assessed. If sect. 3 of stat. 58 G. 3, c. 69, limited his right to six votes, as contended on the other side, the effect would be to diminish the number of votes in vestry.

Lord CAMPBELL, C. J.—I think that the respondents are entitled to judgment on both points. Stat. 58 G. 3, c. 69, is a sort of parish reform Act: it establishes a new *franchise for vestrymen, that [*146 of being assessed to the poor-rate; and it leaves no other. When we come to sect. 4 we find an addition made, in the case of new comers, who are liable and consent to be rated to the poor-rate, though

(a) As to municipal privileges and franchises, see sect. 7 of stat. 13 & 14 Vict. c. 99.

(b) See *Spelman*. Gloss. sub *v. Circet*.

not yet so rated in fact. Thus the third and fourth sections define the only persons who are to have the right of voting in vestry. And this applies to all vestry meetings: otherwise the statute would be a very imperfect "Act for the regulation of parish vestries." As to the other question, it is hardly arguable. Stat. 58 G. 3, c. 69, s. 3, expressly says that "no inhabitant shall be entitled to give more than six votes." Then stat. 13 & 14 Vict. c. 99, s. 6, gives the owner "the same right to vote in vestry, as if he were an occupier duly rated in respect of the same tenement." If he were an occupier so rated, he would not have more than six votes.

(WIGHTMAN, J., was absent.)

ERLE, J.—There is now no common law right of voting in vestry giving anything beyond what is given by stat. 58 G. 3, c. 69. That statute intended to regulate the right, and to take away all rights not there declared. The preamble states that "it is expedient to regulate the manner of holding parish vestries, and the right of voting therein." Sect. 1 extends to all vestries: "no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden" without such notice as is there prescribed: only sects. 8, 9, and 10 exempt customary vestries, vestries regulated by special Acts, and vestries in London and Southwark. Sect. 2 provides as to the chairman. Sect. 3 enacts that *147] "in all such *vestries every inhabitant present, who shall, by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit, or value not amounting to 50*l.*, shall have and be entitled to give one vote and no more;" and so on for higher assessments. It is true that we do not find the words "and no other person:" but the clear implication is that only the persons specified are to vote. I therefore am of opinion that the common law right does not exist beyond the qualification laid down in the Act. Then stat. 13 & 14 Vict. c. 99, when adopted, makes the owner of tenements of a value not exceeding 6*l.* assessable to the poor-rate, and gives him, by sect. 6, "the same right to vote in vestry, as if he were an occupier duly rated in respect of the same tenement." He therefore can have no more than six votes, sect. 3 of stat. 58 G. 3, c. 69, so prescribing universally.

CROMPTON, J.—I am of the same opinion on both points. Stat. 58 G. 3, c. 69, was passed for the purpose of regulating the votes in vestry: sect. 3 defines those who are to vote. It is affirmative in words; but it implies the negative. It would otherwise be very strange to enact that persons should be entitled to vote who were entitled without any enactment. Sect. 4 affords a strong argument that the enactment is exclusive. Then stat. 13 & 14 Vict. c. 99, is equally clear. When the Act is adopted, the owner of the small tenement is, by sect. 6, to have the same right of voting in vestry as if he were an occupier rated for that tenement.* Then comes the question, whether he is to vote in respect of each tenement, beyond the number of six votes. He can *148] give *only six votes, by sect. 3 of stat. 58 G. 3, c. 69, whatever number of tenements he may occupy. Mr. *Lush* contends that he may vote as occupier of A., as occupier of B., and so on, to any extent. But this view is not consistent with the words of the Act.

Appeal dismissed.

THOMAS CLARKE v. SAMUEL AUCHMUTY DICKSON, JOHN WILLIAMS, and THOMAS GIBBS. *April 26.*

A person induced by fraud to enter into a contract under which he pays money may, at his option, rescind the contract and recover back the price, as money had and received, if he can return what he has received under it. But, when he can no longer place the parties in statu quo, as if he has become unable to return what he has received in the same plight as that in which he received it, the right to rescind no longer exists; and his remedy must be by an action for deceit, and not for money had and received.

ACTION for money had and received.

Plea: never indebted. **Issue** thereon.

On the trial before Lord Campbell, C. J., at the London Sittings after last Michaelmas Term, the statements made by the plaintiff's counsel, in opening his case, were: that, in 1853, the plaintiff was induced, by representations made by the three defendants, to take shares in a company called The Welsh Potosi Lead and Copper Mining Company, which was then formed for working a mine on the cost-book principle, and of which the defendants were directors; and to pay deposits for those shares. The mine was worked by the company during the years 1854, 1855, and 1856; and dividends were declared in each of those years. The plaintiff was induced to accept fresh allotments of shares in lieu of the dividends declared. In 1857 the company was in bad circumstances: it was, with the plaintiff's assent, registered as a company with limited liability, and was afterwards wound up under the Winding-up Act. During the process of winding up, the plaintiff for the first time *discovered that the representations by which he [149 was induced to make the purchase were false and fraudulent on the part of the defendants, and that the dividends declared were fraudulent dividends. He therefore brought this action to recover back the deposits which he had paid for the shares.

The Lord Chief Justice declared it to be his opinion that, assuming the contract to take shares to have been induced by fraud, it was not void but only voidable, and that it could not be avoided by the plaintiff after he had taken benefit under the contract. He was therefore of opinion that, assuming the statement to be proved, the plaintiff's remedy was by an action for deceit, and that he could not maintain the present action for money had and received. On this ground he nonsuited the plaintiff on the opening of his counsel.

Kinglake, Serjt., in last Hilary Term, obtained a rule nisi for a new trial, on the ground: "that the Lord Chief Justice, on the opening statement of counsel for the plaintiff, 'That the plaintiff was induced by fraud and fraudulent misrepresentation to become a shareholder in a company of which the defendants were at the time directors and privy to the fraud, and had subsequently, but before discovering the fraud, received credit for a dividend fraudulently paid out of capital,' was wrong in holding that the plaintiff was not entitled to recover the moneys paid by him on such shares."

Knowles, *Edwin James*, *Dowdeswell*, and *Aspland* now showed cause.—The general doctrine, that fraud does not render a contract void, but only voidable at the election of the party defrauded, is now well settled: **Load v. Green*, 15 M. & W. 216; † *Murray v. Mann*, 2 Exch. 538.† It is too late for him to avoid the con- [150

tract after a third party has acquired an interest: *Kingsford v. Merry*, 11 Exch. 577.† Neither can he avoid the contract if he has dealt with the article as his own: *Campbell v. Fleming*, 1 A. & E. 40 (E. C. L. R. vol. 28). In that case the dealing was after the party had notice of the fraud; but the principle applies if he has received any benefit before the discovery. "There can be no rescission of the contract, unless the parties can be placed in statu quo:" per Parke, B., in *Blackburn v. Smith*, 2 Exch. 783, 790.† There is no rescission unless it be total: *Ferguson v. Carrington*, 9 B. & C. 59 (E. C. L. R. vol. 17); *Strutt v. Smith*, 1 C. M. & R. 312.† So in *Sully v. Frean*, 10 Exch. 535,† a plea to a bill of exchange, that the bill was for the price of a ship which the defendant was induced to buy by means of false and fraudulent representations as to its state, it being in fact rotten, was held not issuable; Parke, B., observing: "The plea merely sets up at best a partial failure of consideration. The defendant still has the ship." In *Deposit Life Assurance v. Ayscough*, 6 E. & B. 761, 762 (E. C. L. R. vol. 88), the same principle was stated by Crompton, J. He says: "When the record shows that the contract has been executed so far that the defendant has received a benefit, I have doubted whether, in an action on the contract, the plea of fraud must not show that he has restored what he has received." And it is understood that subsequently, in a case of *151] *Cole v. Bishop*,(a) nowhere reported, this Court acted upon *that principle that this doubt was well founded. The principle laid down by Lord Ellenborough in *Hunt v. Silk*, 5 East 449, that, "Where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in statu quo," is as applicable to a rescission on the ground of fraud as to any other rescission. Now how, on the plaintiff's own statement, can he here put the parties in statu quo? He has had shares; and for three years he has had the chance of their proving profitable. *152] He has received dividends; he might have received them in *money, but elected to receive them in shares; and on them

(a) COLE v. BISHOP.

THIS was an action brought to recover a balance of 200*l.* on an agreement for the sale of the lease of the plaintiff's house, the fixtures, fittings, stock in trade and the good-will of the plaintiff's business, for 750*l.* Pleas: Non assumpsit and Fraud. Issues thereon. On the first trial, before Lord Campbell, C. J., at the Middlesex Sittings after Hilary Term 1854, the verdict passed for the plaintiff for the full amount claimed. In the ensuing term, *M. Chambers* obtained a rule Nisi for a new trial upon affidavits only; which was made absolute in the same term (May 1st, 1854), before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js. On the second trial, at the Middlesex Sittings in Trinity Term 1854, before Wightman, J., the plaintiff again obtained a verdict, which was not disturbed. The affidavits used on the motion show that, before the bargain was made, the defendant had, by plaintiff's consent, placed an agent in the shop to receive the proceeds of the business for one week; and that it was on the report of this agent that the price was agreed on. The affidavits for the defendant made out a strong case to show that during this week the plaintiff had employed different people to go as if they were customers, and pay to the defendant's agent with the plaintiff's money for the goods they seemed to buy; and that the defendant at the trial was taken by surprise, and could not produce his evidence to prove this fraud. The affidavits in answer, besides denying the fraud, stated that the lease, fixtures, fittings and stock in trade were very nearly worth the whole money, and that the defendant was still in possession of them. The reporters are unable to obtain any account of what passed in Banco when the rule was made absolute; but, from the observations made by the court in the case in the text, it is presumed that the court was of opinion that the matter had not been sufficiently investigated at the first trial, but that, if it appeared that the defendant had received benefit under the agreement, as alleged on the affidavits, the plaintiff would be entitled to a verdict; and that Wightman, J., ruled accordingly at the second trial.

also he has had his chance of profit. An offer to return these shares now, if it were practicable, would be like an offer to return a lottery ticket after it has turned up a blank. But it is not possible to return the shares: the other partners in the mine and the creditors of the company have vested rights which prevent that. And, besides, the nature of the shares has been changed; they have, by the act of the plaintiff, been converted from shares in a common partnership into shares in a company with limited liability.

Kinglake, Serjt., Phinn, and Horace Lloyd, in support of the rule.—The question is, whether the opening statement disclosed a case to go to the jury: if it did, the nonsuit was wrong. An allottee of shares in a mine, to be conducted on the cost-book principle, may recover his deposits: *Johnson v. Goslett*, 3 Com. B. N. S. 569.(a) [CROMPTON, J.—In that case the projected company was wholly abortive.] The case is as strong when the company is fraudulent. It is not to be disputed that fraud does not render a contract void except at the option of the party defrauded. [CROMPTON, J.—When you enunciate the proposition that a party has a right to rescind, you involve in it the qualification, if the state of things is such that he can rescind. If you are fraudulently induced to buy a cake you may return it and get back the price; but you cannot both eat your cake and return your cake.] The decision in *Campbell v. Fleming*, 1 A. & E. 40 (E. C. L. R. vol. 28), turned entirely on the dealing *with the property after the [*153] discovery of the fraud. The statement here was that the dividends were themselves fraudulent; it cannot be said that this fresh fraud put the defendants in a better situation. [Lord CAMPBELL, C. J.—For three years the plaintiff has had the chance of profit. Do you say that in the case put, of the lottery ticket, you could return it after it had turned up a blank? CROMPTON, J.—And, besides, the plaintiff has changed the nature of the shares. Do you say that a butcher who has bought live cattle could insist on the vendor restoring the price and taking back the slaughtered carcasses?] It is hard if all remedy for the fraud is lost where the deceit can be prolonged till the deceived party has acted on it. [CROMPTON, J.—All remedy is not lost. He can no longer rescind the contract, which would work injustice; but he may bring an action on the deceit, and recover his real damage. ERLE, J.—That was the case of *Cole v. Bishop*, antè, p. 150, note (a). The purchaser was unable to treat the contract as void ab initio: but in a cross-action tried before me, of *Bishop v. Cole*, he recovered a full indemnity.]

ERLE, J.—I am of opinion that the nonsuit was right. The plaintiff claims to repudiate the contract under which shares were allotted to him; to give up the shares, and recover back the price. There are several grounds of objection, all falling under the same principle: the plaintiff cannot avoid the contract under which he took the shares, because he cannot restore them in the same state as when he took them. In 1853 the plaintiff accepted the shares; and from that time he was, in point of law, in possession of the mine, and worked it by his agent the purser. After three years working of the *mine, and trying to make a [*154] profit, he cannot restore the shares as they were before this was

(a) In Exch. Ch.; affirming the judgment of C. P. in *Johnson v. Goslett*, 18 Com. B. 728 (E. C. L. R. vol. 86).

done. But, further, he not only had the chance of profit, but dividends were declared, and received by him. They were not received in money, it is true; but the receipt of money's worth has the same effect in law. Then he has also changed the nature of the article: the shares he received were shares in a company on the cost-book principle; the plaintiff offers to restore them after he has converted them into shares in a joint stock corporation. Lastly, the offer to restore these shares is not made till after the company is in the course of being wound up, when all chance of profit is over, and the shares can only be a source of loss. I have looked at this as if no others were concerned but the plaintiff and defendants; but no doubt there may have been liabilities incurred by the plaintiff to third persons, rendering it impossible for him to rescind.

CROMPTON, J.—When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that, when that party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract. Now here I will assume, what is not clear to me, that the plaintiff bought his shares from the defendants and not from the company, and that he might at one time have had a right to restore the shares to the defendants if he could, and demand the price from them. But then what did he buy? Shares in a partnership with others. He cannot return those; he has become bound to those others.

*155] *Still stronger, he has changed their nature: what he now has and offers to restore are shares in a quasi corporation now in process of being wound up. That is quite enough to decide this case. The plaintiff must rescind in toto or not at all; he cannot both keep the shares and recover the whole price. That is founded on the plainest principles of justice. If he cannot return the article he must keep it, and sue for his real damage in an action on the deceit. Take the case I put in the argument, of a butcher buying live cattle, killing them, and even selling the meat to his customers. If the rule of law were as the plaintiff contends, that butcher might, upon discovering a fraud on the part of the grazier who sold him the cattle, rescind the contract and get back the whole price: but how could that be consistently with justice? The true doctrine is, that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition.

Lord CAMPBELL, C. J.—I will only say that I remain of the opinion which I expressed at the trial. The plaintiff, on his own showing, cannot rescind the contract and sue for money had and received, but must seek his remedy by a special action for deceit. In that action, if he proves what he states, he will recover, not the original price, but whatever is the real damage sustained.

(No other judge was present.)

Rule discharged.

***HENRY BRINSLEY SHERIDAN v. The PHŒNIX Life Assurance Company. April 26. [*156**

Plaintiff effected a policy of assurance with defendant, dated 2d August, 1856, on the life of B.

The policy recited that plaintiff had paid to defendant 8*l.* 5*s.* as the premium for the assurance to 2d November, 1856; and it witnessed that, if B. should die before the termination of twelve calendar months from the date, or should live beyond such period, and plaintiff should, on or before that period, or on or before the expiration of every succeeding twelve calendar months, provided B. be still living, pay the annual amount of premium, then defendant should be liable to pay 1000*l.*: provided that, if B. died before the whole of the said quarterly payments should have become payable under these presents for the year in which he should so die, it should be lawful for the defendant to deduct and retain from the said 1000*l.* so much as would be sufficient to pay and satisfy the whole of the said premiums for that year, reckoning the year to commence from 2d August.

B. died within twelve calendar months from the date; and, at the time of his death, the third quarterly instalment of 8*l.* 5*s.* was due and unpaid.

Held by the Court of Exchequer Chamber (dubitante Willes, J.), reversing the judgment of the Court of Q. B., that the defendant was liable to pay the 1000*l.*, the policy being from year to year, not from quarter to quarter; and the payment of the instalments at the quarters not being a condition precedent to the continuance of the policy for the current year.

COUNT on a policy of life assurance, which was set out in hæc verba in the count. The material parts were as follows.

"Phoenix Life Assurance Company. Chief office, 1 Leadenhall Street, London. Sum assured, 1000*l.* No. 3115. Annual premium, 33*l.* Whole term. Payable by quarterly instalments of 8*l.* 5*s.* each. Participating scale."

"Whereas Henry Brinsley Sheridan, for and on behalf of The Times Life and Guarantee Society, No. 32, Ludgate Hill, London, hereinafter designated the assured, has proposed to effect an assurance with The Phoenix Life Assurance Company, in the sum of 1000*l.* upon and for the whole continuance of the life of Carl Frederick Albert Blomberg of No. 81, Mere Street, Berlin; and whereas the said assured has paid to the said company the sum of 8*l.* 5*s.*, as the premium for the said assurance until the 2d day of November, 1856: *Now this policy witnesseth [*157 that, if the said Carl Frederick Albert Blomberg shall die before the termination of twelve calendar months from the date hereof, or shall live beyond such period, and the said assured or his assigns, or the holders of this policy who shall be registered as such in the book hereinafter mentioned of the said company, shall, on or before that period, or on or before the expiration of every succeeding twelve calendar months, provided the said Carl Frederick Albert Blomberg be still living, pay or cause to be paid, at the office for the time being of the said company, the annual amount of premium, then the funds and other property of the said company shall, according to the deed of settlement of the said company for the time being, be subject and liable to pay to the said assured or his successors in office, executors, administrators, or assigns, as the case may be, or to the holder of this policy who shall be registered as aforesaid, within three calendar months after satisfactory proof of the death of the said C. F. A. Blomberg shall have been received at the said office of the said company, the sum of 1000*l.*, together with such further sum or sums as shall have accrued to this policy by way of bonus pursuant to the rules and regulations for the time being of the said company. Provided always that, if the said C. F. A. Blomberg shall happen to die before the whole of the said quarterly payments shall

have become payable under these presents for the year in which he shall so die, it shall be lawful for the said directors to deduct and retain from the said sum of 1000*l.* so much as will be sufficient to pay and satisfy the whole of the said premiums for that year, reckoning the said year to commence from the 2d day of August." There was a proviso avoiding *158] the *policy if Blomberg should die by duelling or by his own hand before he had been assured fifteen months and made two annual payments; and in some other events not material. "In witness," &c.: seal of company: signatures of three directors: date 2d August, 1856. Averments of general performance of conditions, and of the death of Blomberg after the making of the policy and while it was in force. Breach: non-payment.

Plea 5. That the said Carl Frederick Albert Blomberg died within twelve calendar months from the date of the said policy, and after the third of the said quarterly instalments or payments of 8*l.* 5*s.* each became payable according to the said policy; and at the time of his death the said third of the said instalments was unpaid, and never was paid, although the defendants were ready and willing to receive the same when it became payable: and by the said non-payment the said policy became lapsed and was void. Demurrer. Joinder.

The case was argued in this Term.(a)

C. Milward, for the plaintiff.—The question is on the construction of the policy. The Company might have made the punctual payment of each quarterly instalment during the first year a condition precedent to the right to be paid if the life dropped within the year; but they have not done so. They might sue for the quarterly premium.

Hugh Hill, contra.—The general scheme of all life insurance is that the assured is at liberty, by paying the annual premiums from year to *159] year, to keep up the *policy, or at liberty to refrain from paying the premium in any year and let it drop. No insurance office ever can sue for a premium; for the insured is at liberty not to pay it; the office relies on the payment being a condition for keeping up the policy. Here, in this particular policy, the same principle is extended to the quarterly payments.

C. Milward was heard in reply.

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

On narrowly inspecting the strangely framed life policy on which this action is brought, we have come to the conclusion that it is to be construed as a policy from quarter to quarter, leaving the assured at liberty to drop it at the end of any quarter, and not imposing any continuing liability on the insurance company unless the quarterly payment is made at the end of the quarter. "The annual premium, 33*l.*," is expressly declared to be "payable by quarterly instalments:" and it would require clear language to show that credit was to be given for any part of the premium after the time when it became due, and that the insurance company agreed to be liable for a prolonged space of time in respect of which the premium payable had not been paid. The policy does say that, if Blomberg should die before the termination of twelve calendar months from its date, the company should be liable: but it adds a condition as to the payment of premium, which we think amounts to a condition precedent that the premium shall be paid quarterly:

(a) April 23d. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

and nothing follows to show that the language *creating the condition is not used according to its natural meaning. As no [*160 general rule of law is in question, and as policies in this extraordinary form must be exceedingly rare, we do not think that there would be any advantage in commenting more particularly on its terms before giving judgment for the defendants. Judgment for defendants.

COURT OF EXCHEQUER CHAMBER.

[Nov. 29, 1858.]

THE plaintiff alleged error in the Court of Exchequer Chamber. The defendants denied the error.

The case was argued in the Exchequer Chamber in Michaelmas Vacation, 1858.(a)

Lush, for the plaintiff.—The policy expressly stipulates that the 1000*l.* is to be paid if Blomberg dies within twelve months from the date of the policy, 2d August, 1856. This is not qualified by what is added. As the language of the instrument is that of the company, it must, if there be an ambiguity, be construed against them. And the language is at least consistent with the liability for which the plaintiff contends. The annual premium is to be paid on or before the expiration of every twelve months: it is true that, according to the heading of the policy, though not according to the body, the premium is to be paid quarterly: but this is merely a particular mode of payment agreed to: a *default in this is not a default in the performance of the [*161 condition of payment of the annual premium at or before the expiration of the year. The policy, instead of requiring payment of the whole annual premium in advance, gives time for its being paid by instalments: and there are no words avoiding the policy in the case of non-payment of the instalments. The company cannot lose: under the proviso they may always deduct the premiums for the whole current year. It is an insurance for each year, not for each quarter: the proviso is unintelligible if the insurance is to drop at the end of any of the first three quarters.

Bovill, contra.—The insurance is clearly, in the first instance, only from 2d August to 2d November. Connecting this with the heading, the result is that the insurance is for each quarter, the assured having the option of continuing it for the whole period of Blomberg's life by paying 8*l.* 5*s.* at the end of each quarter: but, in default of such payment, the policy drops. It is an ordinary form, in a policy, to recite that the assured has paid a certain sum as the premium for the first year: here the quarter is substituted for the year. [WILLIAMS, J.—How do you deal with the words which state the condition to be that the "annual amount of premium" is to be paid "on or before that period," that is, the period of twelve calendar months from the date, "or on or before the expiration of every succeeding twelve calendar months?"] The premiums for the whole year must, no doubt, be all paid at or before the expiration of the year: but they are to be paid

(a) November 27th, 1858. Before Cockburn, C. J., Pollock, C. B., Williams, Crowder and Wiles, J_{s.}, and Martin, Watson, and Channell, B_{s.}

quarterly. The heading of the policy must be taken into consideration: *162] without that it does not appear what the whole annual premium *is. [POLLOCK, C. B.—If the insurance be only quarterly, what does the assured get in return for the right, which the company by the proviso reserve, of deducting the premium for the whole year, at whatever time in the year the death occurs?] He is relieved from paying the whole annual premium in advance. The words “or shall live beyond such period,” as they refer to a contingency which has not occurred, may be struck out; and then the words “shall die before the termination of twelve calendar months from the date hereof” will be connected with the condition of payment, that is of payment of the annual premium by quarterly instalments. The proviso assumes that the premiums are due quarterly. In *Want v. Blunt*, 12 East 183, a point something like this was discussed. [COCKBURN, C. J.—There was no question there between annual and quarterly insurances.] The policy was there considered to have dropped by non-payment of the quarterly premium.

COCKBURN, C. J. (stopping *Lush*, in reply).—We are unanimous in considering that the judgment must be reversed. We will deliver a written judgment on Monday.

WILLES, J.—I myself have considerable doubts, but not sufficiently strong to induce me to differ from the rest of the Court.

Cur. adv. vult.

POLLOCK, C. B., now delivered the judgment of the Court.

*163] This was an action on a life policy effected by the *plaintiff with the defendants upon the life of Carl Frederick Albert Blomberg. The declaration set forth the policy: by which it appeared that the sum assured was 1000*l*. The “annual premium, 33*l*.” “Whole term” (no doubt meaning the whole term of life). “Payable by quarterly instalments of 8*l*. 5*s*. each.” The policy, after reciting the proposal, and that the assured had paid to the said company the sum of 8*l*. 5*s*. as the premium for the said assurance until the 2d day of November, 1856, proceeded thus: “Now this policy witnesseth that, if the said C. F. A. Blomberg shall die before the termination of twelve calendar months from the date hereof, or shall live beyond such period, and the said assured or his assigns, or the holders of this policy who shall be registered,” &c., “shall, *on or before that period*, or on or before the expiration of every succeeding twelve calendar months, provided the said C. F. A. Blomberg be still living, pay or cause to be paid, at the office for the time being of the said company, the annual amount of premium,” then the funds of the company shall be subject and liable, &c. There was then a proviso that, if the said C. F. A. Blomberg should happen to die before the whole of the said quarterly payments should have become payable under those presents for the year in which he shall so die, it shall be lawful for the directors to deduct and retain from the said sum of 1000*l*. so much as would be sufficient to pay and satisfy the whole of the said premiums for that year. There was a further provision that, if the person whose life was insured should die by duelling or by his own hand before he should have been assured by the company fifteen months and made two annual payments, the policy should be void.

*The declaration then stated that, while the policy was in full force, C. F. A. Blomberg died. The usual averments were then made: and the sum insured, &c., was claimed. [*164

The defendants pleaded that C. F. A. Blomberg died within twelve calendar months from the date of the policy, and after the third quarterly payment became payable; and that, at the time of his death, the third instalment was unpaid, and never was paid. To which there was a demurrer; and joinder in demurrer.

On the arguments in the Court below (which have not been fully reported) the Court gave a written judgment for the defendant. Upon which the present writ of error has been brought: and the case was argued before us on Saturday last.

For the plaintiff, Mr. *Lush* contended that this was an annual policy; that is, a policy for a year, and from year to year; the annual premium being payable by quarterly instalments; the first instalment being payable immediately, the remainder by three quarterly payments. And it was argued that, time having been given, the non-payment at the day appointed could not be a ground of forfeiture or render the policy void, or be construed as a condition precedent, without express words to that effect: and our attention was called to the fact, that there are no such express words.

On the part of the defendant, Mr. *Bovill* argued that the policy was, in substance, not an annual one, but from quarter to quarter; that the due payment of the quarterly instalment was a condition precedent to the continuance of the policy for another three months; and that, the instalment not having been paid at the day, the policy was not continued, and therefore ceased. In support of *this view it was urged that the sum recited to have been paid showed that the [*165 assurance was for three months only, as it was called "*the premium for the said assurance until the 2d day of November, 1856.*" We rather think the words "*for the said assurance*" should be read as if within a parenthesis, and that the *premium* until the day is meant, and not the assurance. It was further argued, that the operative words in the policy should be read thus: "If the said C. F. A. Blomberg shall die before the termination of twelve calendar months from the date hereof, and the said assured, &c., shall, on or before that period, pay or cause to be paid the annual amount of premium, then the funds shall be liable," &c. And Mr. *Bovill* contended that the expression "annual amount of premium" was to be expounded to mean the quarterly payments on the regular days when they would become due; and that we ought to hold such payments to be conditions precedent to the continuance of the policy. This is certainly the most favourable way of presenting the case of the defendants. But, assuming that the policy is to be so read, we cannot adopt the construction suggested by Mr. *Bovill*, and especially that which makes payment on the quarter days a condition precedent.

We entirely agree with the Court of Queen's Bench that this is a strangely framed life policy; and the cause of it is obvious enough: the company have engrafted some new terms upon the old form, without making all the alterations necessary to render the policy consistent and intelligible. But we think the consequence of this is that, as far as reasonably and properly we can, we ought to construe the contract (the

language and terms of which proceed entirely from the office) so as not *166] to defeat the contract, or make it void, or work what is in the nature of a forfeiture, without express words which require us to do so.

The question perhaps does not admit of any solution wholly free from doubt or difficulty.

If the policy is held to be an insurance from year to year, time being given to pay the instalments, some doubt may be entertained whether the instalments, as they became due, constituted a debt from the assured to the company. On the other hand, if this was a policy from three months to three months, the condition by which the company may deduct and retain what will give them a whole year's premium cannot be accounted for. And, in order to enforce the payment of the quarterly instalments, we have to infer a condition "precedent" which will defeat the policy, without any express words which create one. We think we are bound to put on every contract that construction which in our judgment is the true one: but, if there be a doubt, we think, of all instruments that come before us, none requires a more liberal construction than a life policy.

We are of opinion that, on the true construction of this policy, it was an annual insurance; that is, an insurance for a year, and from year to year, time being given to pay the annual premium by quarterly instalments: and that it was not an insurance from quarter to quarter (which is the ground of the decision in the court below): and we are of that opinion, because the premium is at the commencement called an annual premium, and is several times mentioned in the policy as an annual premium; also because the death of the party insured is always referred to a period of twelve months, and not three months; and because the power to deduct seems founded upon the right of the company originally *167] to have the whole annual premium paid at the beginning of the year, the payment by instalments being an indulgence which ought not to prejudice the company. And we are of opinion that, as soon as the insurance was effected, the life was insured for a year. Had the assured agreed to pay the instalments, there would have been no doubt; the consideration of the insurance would have been one instalment actually paid, and an agreement to pay the others: and it would have required a clear and express provision to defeat the policy and render the insurance void on non-payment of the instalments at each quarter. As the policy is actually framed, there is no promise to pay; but also there is no express statement or provision as to the consequence of non-payment. And we think express words are necessary, in this case, to make the non-payment at the quarter a condition precedent to the continuance of the policy. There is nothing in the policy that requires us to infer such a condition. There is no provision that the policy shall cease if the quarterly instalments be not regularly paid: there might have been nothing unreasonable if there had been such a provision; but, reasonable or not, we must have given effect to it had it formed part of the contract. But it does not, in our judgment; which must therefore be for the plaintiff. Judgment reversed.(a)

(a) The judgment of the Court of Exchequer Chamber was reversed in the House of Lords, 13th August, 1860.

***JOHN CHAPMAN, Administrator of MARGARET CHAPMAN** his late wife, deceased, suing for the benefit of himself, [*168 as the husband of the said MARGARET CHAPMAN, v. JOHN ROTHWELL. *April 27.*

Plaintiff, as administrator to his deceased wife, declared that defendant was in occupation of a brewery and office, and a passage leading thereto from the public street, used by defendant for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street: yet defendant wrongfully and negligently permitted a trap-door in the floor of the passage to be and remain open without being properly guarded and lighted; and the wife, who had been to the office as a customer of defendant, and otherwise in defendant's business, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being and remaining open and not properly guarded and lighted; whereby she was killed.

On demurrer to the declaration, held:

1. That the plaintiff's right to sue as administrator, under stat. 9 & 10 Vict. c. 93, sufficiently appeared, without express allegation of pecuniary damage.
2. That the duty of defendant, and breach, sufficiently appeared.

THE declaration charged that defendant, "before and at the time of the grievances hereinafter mentioned, was in the possession and occupation of a brewery, office, and passage leading thereto from the public street, used by him for the reception of customers and others in his trade and business of a brewer; and which said passage was the usual and ordinary means of ingress and egress to and from the said office from and to the said public street. Yet the defendant wrongfully and negligently permitted a certain trap-door then being in, and in the floor of, the said passage to be and remain open, without being properly guarded and lighted. And the plaintiff says that the said Margaret, his wife, who had been to the said office of the said brewery as a customer of the defendant, and otherwise in the business of the defendant, and was lawfully passing along the said passage on her *return [*169 from the said office to the said street, by reason of the said negligence and improper conduct of the defendant fell through and into the aperture and hole caused by the said trap-door being and remaining open and not properly guarded and lighted as aforesaid. Whereby she was injured and killed. And the plaintiff (as administrator as aforesaid) claims 200*l.*"

Demurrer. Joinder.

Aspland, for the defendant.—The declaration discloses no claim sustainable under stat. 9 & 10 Vict. c. 93. First: no pecuniary injury is shown to have accrued to the plaintiff. [Lord CAMPBELL, C. J.—The damages might be proved by evidence, under this declaration. CROMPTON, J.—Sect. 1 appears to contemplate giving damages wherever the party injured could have recovered them, whether nominal or more.] But there must be some damage accruing to the party who sues. Under stat. 14 G. 3, c. 48, ss. 1, 3, it was held that a father, who had not a pecuniary interest in the life of his son, could not recover on a policy effected in his own name on such life, though the statute does not contain the word "pecuniary:" *Halford v. Kymer*, 10 B. & C. 724 (E. C. L. R. vol. 21). And in *Blake v. Midland Railway Company*, 18 Q. B. 93 (E. C. L. R. vol. 86), this Court decided expressly that, under stat. 9 & 10 Vict. c. 93, none but pecuniary damages are recoverable. If, however, this declaration could, as is now suggested from the Bench, let

in evidence of pecuniary damage, it must be admitted that this point cannot be taken on demurrer. But, further, no wrong is shown by the declaration. There is no allegation that it was the duty *of the *170] defendant to keep the trap-door closed. [Lord CAMPBELL, C. J.—It is better to show the facts from which the duty arises.(a)] No such facts appear. [ERLE, J.—If you invite a customer to come to your shop and leave a pitfall open, or a large iron peg in the part of the floor over which the customer is likely to tread, is not that a duty and a breach, if an accident ensues?] Here no invitation is shown. [Lord CAMPBELL, C. J.—Is there not, substantially?] In *Southcote v. Stanley*, 1 H. & N. 247,† a case much like the present, it was held that the defendant was not liable. [ERLE, J.—The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer who, as one of the public, is invited for the purposes of business carried on by the defendant.] That distinction is certainly unfavourable to the present defendant.

C. W. Wood, for the plaintiff, was not called upon.

Per CURIAM.(b)

Judgment for plaintiff.

(a) See the *Lancaster Canal Company v. Parnaby*, 11 A. & E. 230 (E. C. L. R. vol. 39), in Exch. Ch., affirming the judgment of Q. B. in *Parnaby v. The Lancaster Canal Company*, 11 A. & E. 223; *Seymour v. Maddox*, 16 Q. B. 326 (E. C. L. R. vol. 71).

(b) Lord Campbell, C. J., Erle and Crompton, Js.

In *Frees v. Cameron*, 4 Richardson which she accidentally fell; and it was 228, a clerk of the defendant, who was held that the defendant was liable, as a retail dealer, took a female cus- he, from the nature of his business, tomer into a dark part of the store, held out an invitation to the public to where there was a trap-door, which come upon his premises. had been negligently left open, through

*171] *LEMON THOMAS, Appellant, v. EVAN EVANS,
Respondent. April 28.

Stat. 1 Eliz. c. 17, s. 3, prohibits fishing except with a net "whereof every mesh or mask shall be two inches and a half broad."

Held that the breadth of two inches and a half is to be measured by the length of thread between the adjacent knots.

So decided, on a case arising under a local Act (45 G. 3, c. 33, for Carmarthenshire) which, by reference to stat. 1 Eliz. c. 17, contained the same prohibition.

THIS was a case stated for the opinion of this Court under stat. 20 & 21 Vict. c. 43.

The appellant was convicted at petty sessions, before four justices of Carmarthenshire, and adjudged to pay 20s. penalty and 7s. costs: "For that he, the said Lemon Thomas, did, within three calendar months last past, to wit" (15th July then last), at, &c., "unlawfully fish for salmon, in the water of the river Towy there, with a certain net, whereof the mesh was less than two inches and a half broad, contrary to the statute," &c.

(a) Local and personal, public: "For the preservation of salmon and other fish in the rivers in the county of Carmarthen, and county of the borough of Carmarthen."

The information was laid by Evan Evans, under sect. 2 of stat. 45 G. 3, cap. 33,(a) whereby it is enacted that no person shall at any time thereafter "fish therein" (the said river Towy being one of the rivers enumerated in the said Act) "for salmon with any other net or nets than such as is or are allowed by an Act" &c. (1 Eliz. c. 17, "For preservation of spawn and fry of fish"), on pain of forfeiting, for a first offence, any sum not exceeding 10*l.* nor less than 20*s.* And by the said statute of Elizabeth it is enacted (b) that no person shall take fish, as therein mentioned, "but only with net or *trammel whereof the [*172 mesh (c) shall be two inches and a half broad."

The fact that Thomas did, on the day in question, fish in the river Towy for salmon was clearly proved, and that the mesh of the net he used measured exactly one inch and a half from side to side; in other words, that the spaces between the next opposite threads of the said net were each only one inch and a half square: which Thomas contended was sufficient, inasmuch as each mesh would measure three inches when drawn in a straight line; and such line should be deemed to be the breadth of the mesh. The case then stated:

"We, however, being of opinion that the mesh of the net defendant used was too small, and that every space between the threads of the net should have been two inches and a half from one thread to the opposite, and the superficial area between the threads which bound each mesh should have been two inches and a half square at least, to comply with the requirements of the Acts hereinbefore cited, convicted the said Lemon Thomas as aforesaid."

Whereupon the appellant appealed.

C. Milward, for the respondent.—The question is, what satisfies the requisite, in stat. 1 Eliz. c. 17, s. 3, that every "mesh" shall be "two inches and a half broad." "Mesh" properly means the instrument with which the loop of the net is made; each of the four sides of the loop is therefore of the breadth of the mesh. [CROMPTON, J.—In Johnson's Dictionary the definition of "mesh" is "The interstice of a net; the space between *the threads of a net." In Richardson's Dic- [*173 tionary also the definition is, "The hole of a net between thread and thread."

H. S. Giffard, for the appellant.—The mesh of the net is two inches and a half broad if the diagonal of the loop, when drawn straight, is of that breadth. In stat. 3 Ja. 1, c. 12, which is itself an Act for the preservation of fish, there is, sect. 2, a prohibition against fishing "with any draw-net or drag-net under three inches mesh, viz. one inch and an half from knot to knot." The distance from each knot or angle to the adjacent knot or angle is identical with the distance between the opposite threads or sides; so that, by the definition in the statute last cited, the mesh of the net used by the appellant was a three inches mesh. [*C. Milward*.—That statute relates to sea fishing. But stat. 5 & 6 Vict. c. 106, s. 20, relates to salmon-fishing, and enacts as to the Irish fisheries, "that no drag, stake, bag, or other net or engine for the taking of salmon with meshes or openings of less size than two inches and a half between knot and knot or angle and angle, to be measured on each side of the

(a) Local and personal, public: "For the preservation of salmon and other fish in the rivers in the county of Carmarthen, and county of the borough of Carmarthen."

(b) Sect. 3.

(c) "Every mesh or mask."

square, or ten inches measured round each such mesh or opening," shall be used. This shows that the breadth of the mesh means the same thing as the side of the square. Lord CAMPBELL, C. J.—That can hardly be taken as a general definition of the breadth of a mesh: it is a prohibition of a particular act there defined. CROMPTON, J.—The use of the word "mesh" in stat. 1 Eliz. c. 17, s. 3, would rather seem to be explained by stat. 3 Ja. 1, c. 12, s. 2. Stat. 5 & 6 Vict. c. 106, s. 20, may describe *174] the act prohibited more precisely *on account of the ambiguity of earlier enactments.] There is nothing in it qualifying the definition of "mesh," which must determine the decision of this case.

C. Milward replied.

Lord CAMPBELL, C. J.—I think this conviction was right. The magistrates have been of opinion that the mesh was too small. The word "broad" might, and probably did, guide them to that conclusion. At first, I was struck with the definition, in stat. 3 Ja. 1, c. 12, s. 2: but that relates to sea-fishing, and cannot be taken as a general definition as to how a mesh is to be measured: and then we have a subsequent statute relating to salmon-fishing, in which the two and a half inches is estimated as the magistrates have estimated it.

WIGHTMAN, J.—I am of the same opinion. The ordinary definition of "mesh" is the space from thread to thread. That, by stat. 1 Eliz. c. 17, s. 3, is to be two inches and a half broad: the word "broad" shows that the word is used in that sense. Stat. 3 Ja. 1, c. 12, s. 2, defines the size of which a mesh must be for the purposes of that Act. It shows that the word "mesh" was not then accurately defined; and it does not use the word "broad." We have a good guide here in sect. 20 of stat. 5 & 6 Vict. 106, which is directed to salmon-fishing.

ERLE, J.—I think the conviction right. The words of stat. 1 Eliz. c. 17, s. 3, are capable of the *interpretation which has been put on *175] them; and this interpretation is clearly in favour of the preservation of fish. Stat. 3 Ja. 1, c. 12, s. 2, is not in *pari materia*; nor are the words the same: the words "three inches mesh, *viz.*" are capable of a construction quite different from that of the words "mesh or mesh shall be two inches and a half broad."

CROMPTON, J.—On reading the section upon which the conviction is founded, by itself, I felt no doubt as to the meaning of breadth of mesh; perhaps I do not feel quite so clear as the rest of the Court as to the non-applicability of stat. 3 Ja. 1, c. 12, s. 2. Stat. 5 & 6 Vict. c. 106, s. 20, does not, in my opinion, help us much, being evidently framed with a view to do away with the existing ambiguity. But, looking at the section itself, 1 Eliz. c. 17, s. 3, I find the word "broad." A little doubt is suggested in my mind by stat. 3 Ja. 1, c. 12, s. 2: but, on the whole, I agree with the rest of the Court.

Conviction affirmed.

*176] *BUSBY, Appellant, v. The CHESTERFIELD WATER-
WORKS and GAS LIGHT COMPANY, Respondents.

April 28.

A local Act (18 & 19 Vict. c. xxix., for Chesterfield) required a water company to furnish to occupiers of houses, who should "demand a supply of water for domestic use," a sufficient supply thereof, at rents fixed according to the assessment of the houses to the poor-rate.

The Act incorporated The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17). An occupier was assessed upon his house and premises, including a coach-house, stable, and yard. He kept, for private use, a carriage in the coach-house and a horse in the stable; and, on the premises, he applied, for the horse and for washing the carriage, water supplied by the company for domestic use.

Held, that he was entitled to do so, the water being, within the meaning of the Act, applied to domestic use.

THIS was a case stated under stat. 20 & 21 Vict. c. 43.

An information was, on 17th December, 1857, laid before a justice for the borough of Chesterfield, Derbyshire, by William Machin, the manager of the respondents' works, and on the respondents' behalf, charging that the appellant was indebted to the respondents in the sum of 5s. for unliquidated damages for taking and using the respondents' water for other than domestic use or purposes, without the respondents' consent, without having demanded such water, and without having agreed with the respondents upon any terms or conditions with respect to the supply of the same, the appellant not being entitled to take water from the respondents for other than domestic use or purposes.

The respondents by their solicitor, and the appellant in person, appeared before two justices of the said borough at a petty sessions of the peace held in and for the said borough on 28th December, 1857; when the witnesses tendered by both parties were sworn and examined.

It was admitted, by both parties, that the object of the information was to raise the question, whether or *not, under The Chester- [*177
field Waterworks and Gas Light Company's Act, 1855, (a) a supply
of water for domestic purposes to the occupier of a dwelling-house

(a) 18 & 19 Vict. c. xxix., local and personal, public: "To enable the Chesterfield Waterworks and Gas Light Company to extend their undertaking; and for other purposes."

Sec. 12 incorporates (subject to a proviso not here mentioned) The Companies Clauses Consolidation Act, 1845, The Lands Clauses Consolidation Act, 1853, The Waterworks Clauses Act, 1847, and The Gasworks Clauses Act, 1847.

Sec. 31. "The company shall furnish to the owner or occupier of any house who shall be entitled to demand and who shall demand a supply of water for domestic use, including water-closets, a sufficient supply thereof at the following annual rents or prices, according to the poor-rate assessment of such houses for the time being; that is to say,

		£	s.	d.
"For any house of which the yearly value does not amount to . . .	£4	0	6	0
And of which the yearly value amounts to } £4 and does not amount to . . .	£6	0	8	0"
&c.	£25			
"	£30	1	10	0
&c.	£30			
"	£35	1	15	0"
&c.	£35			
"	£75	4	0	0"
&c.	£80			

Sec. 32 enables the company to demand, for a year's supply to every bath in a dwelling-house, payments according to specified rates. "Provided always, that the company shall not be compelled to supply any water-closet or bath in any house" unless certain precautions be adopted in the construction.

Sec. 33. "A supply of water for domestic purposes shall not include a supply of water for machinery, railways, or for any trade or business whatsoever, or for watering gardens, or for fountains, or for any ornamental purposes whatsoever."

Sec. 34. "It shall be lawful for the company, so long as they can do so without interfering with the due supply, in pursuance of the provisions of The Waterworks Clauses Act, of the inhabitants within the limits of this Act, and the company are hereby required, to supply water for other than domestic purposes to all persons who shall demand the same, and who, according to the provisions of this Act and of the said Waterworks Clauses Act, are entitled to demand a supply of water for domestic purposes." Then follow provisions as to the rates to be charged for such supply.

*178] included a *supply of water for horses and washing carriages, kept by the occupier on his premises for his private use.

The facts of the case proved were as follows.

The appellant, during the year ending 30th September, 1857, and some time previously, occupied, as one tenement, a private dwelling-house, with a garden immediately in front thereof, and a small courtyard (in which were a coach-house and stable) immediately behind the house: the whole premises formed one enclosure, and were occupied together; and the garden, yard, stable, and coach-house were appurtenant to the dwelling-house. All the premises were situate in the borough of Chesterfield. The appellant kept for his private use, in the coach-house and stable, a carriage and one horse.

Previously to the appellant's occupation of the premises, water had been laid on to them by the respondents from their works. And, during the year ending 30th September, 1857, the appellant used the water so laid on by the respondents for all the purposes of his dwelling-house, for his horse, and for washing his carriage on the premises.

The appellant's house and premises are assessed to the poor-rate of the township of Chesterfield, in one item, as follows:—

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name or situation of Property.	Estimated extent.	Gross estimated rental.	Rateable value.	Rate at 1s. 6d. in the pound.
487	C. S. B. Busby.	Hurst's executors.	House, garden, and stable.	Abererombie Street.	A. R. P. 11 1 0	£ s. d. 39 18 0	£ s. d. 33 12 0	£ s. d. 2 16 0

*179] *The respondents do not make out any separate book in the nature of a rate-book on the inhabitants for supplying them with water: but, in regulating their charges for water supplied for domestic purposes, the respondents rely upon the rateable value of premises appearing in a book alleged, but not proved before us, to be a copy of the valuation of the township of Chesterfield, on which the poor's-rate assessment is based. In this book separate values are placed upon houses, outbuildings, stables, coach-houses, and gardens, whether occupied together or not. The respondents charged the appellant for a supply of water for all domestic purposes, for the year ending as aforesaid, the sum of 30s. The value of the appellant's said dwelling-house, without the garden, coach-house, and stable appurtenant thereto, appeared by the said book to be under the yearly rateable value of 30l. The dwelling-house, with the stable and coach-house appurtenant thereto, appeared by the same book, as well as by the poor-rate assessment, to be above the rateable value of 30l. The appellant duly paid the charge of 30s. made upon him by the respondents for a supply of water for domestic purposes for the year ending 30th September, 1857.

The respondents stated that they had sustained damages to the amount of 5s., by reason of the appellant, during the year ending as aforesaid, using for his horse and washing his carriage as aforesaid the respondents' water without any special agreement; the respondents contending that the water so used as last aforesaid was not a supply for domestic use or purposes under The Chesterfield Waterworks and Gas Light Company's

Act, 1855. The appellant contended that it was included in the supply for domestic purposes: *and this was the only question the justices were called upon to decide. [*180

The respondents, in support of their information and the form of their proceedings before the justices, referred to The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), sects. 35, 44, and 85; The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), sect. 145; and The Chesterfield Waterworks and Gas Light Company's Act, 1855, (a) sects. 12, 31, 33, and 34.

The case then stated:

"We decided against the appellant, and made an order against him for payment of the sum of 5s. claimed by the respondents, and the costs incurred before us. And the ground of our determination was, that we considered that the respondents had made out their case, and that, under The Chesterfield Waterworks and Gas Light Company's Act, 1855, a supply of water for domestic purposes did not include a supply of water for any horses or washing any carriages."

The appellant thereupon appealed.

Pashley, for the appellant.—The question is whether, under sect. 31 of stat. 18 & 19 Vict. c. xxix., the use of the water for the horse and for cleaning the carriage is "domestic use." Use of water for animals kept for the purposes of trade would not fall within the words: but water used, as this is, for the ordinary purposes of the family, does. It might as well be objected that the water drunk by a coachman living in the stable did not. In Bailey's New Universal Etymological English Dictionary (London, 1764), *Domestical* or *Domestic* is defined as: "1. Of or pertaining to a private household, not *relating to the public." [*181 "2. Intestine, relating to one's own country, in opposition to what is foreign." "3. Private, done at home, not open." "4. Inhabiting the house, tame, not wild." That clearly comprehends the use which is now in question.

Macnamara, contra.—"Domestic use" means an use by the family for the consumption and cleanliness of those resident in the house. Sect. 12 of the Local Act incorporates The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), of which sect. 35 enacts that "the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town," &c., who "shall be entitled to demand a supply, and shall be willing to pay water-rate." But it cannot be supposed that the provision for wholesome water extends to the water used for washing a carriage. By sect. 31 of the Local Act the assessment is to be for the house only, and does not include stables: and sect. 34 has a separate provision as to water supplied for "other than domestic purposes." The anxiety of the legislature to distinguish the different uses appears from the special provisions as to baths and waterclosets, in sects. 31, 32. In Webster's Dictionary, "Domestic" is defined, in the first place, as "Belonging to the house, or home; pertaining to one's place of residence, and to the family:" and none of the subsequent definitions apply to such a case as this.

Pashley, in reply.—This user of water does belong to the house or

(a) *Antè*, p. 177, note (a).

home, and does pertain to the place of residence. (He was then stopped by the Court.)

*182] *Lord CAMPBELL, C. J.—I answer the question which is raised in the affirmative. The horse and carriage were for private use, and were kept on the premises: that being so, the water used for them was applied to domestic use. If that be not so, I do not see how we are to distinguish between a horse so kept and a dog or cat. The horse and carriage are kept for the use of the occupier of the house, for his health and enjoyment, in an outhouse belonging to his premises. The water company need be under no apprehension of being losers: they ought to have a fair remuneration for the supply which they impart, and will look to the sum at which the party supplied is rated. If there be separate rates on a house and stable there will be distinct charges: and, when the whole are rated together, they will charge the aggregate for domestic use.

(WIGHTMAN, J., was absent.)

CROMPTON, J.—The only question is whether domestic use does not include water used in this way in the stable. The stable is part of the house: I cannot see why water taken for use in the stable is not water taken for domestic use.

ERLE, J.—I cannot find in the Act anything which defines what domestic use is. The horse and carriage are for the use of the family. If the rateable value of the premises is properly fixed the company will receive the proper sum: if not, they are entitled to have the rate properly made.

Appeal allowed.

*183] *The PRINCE OF WALES Life and Educational Assurance Company v. ROBERT PALMER HARDING, Official Manager of The ATHENÆUM Life Assurance Society. *April 30.*

The deed of settlement of a life assurance society, completely registered under stat. 7 & 8 Vict. c. 110, provided, by the 20th section of the deed, that the common seal should not be affixed to any policies except by the order of three directors, signed by them and countersigned by the manager, and, by sect. 28, that every policy should be given under the hands of not less than three of the directors and sealed with the common seal. By sect. 101, the books containing the proceedings of the general meetings and of the board of directors were to be open to the inspection of shareholders. A policy was executed, sealed with the common seal, and signed by three directors, one of whom was manager; but there was no previous order made as required by the 20th section. The company, in discussions with the assured, treated the policy as effective. Held: that they could not repudiate their liability on the policy, upon the ground that the execution was not authorized.

Two life assurance companies, P. and A., were in the habit of reassuring to each other in respect of policies granted to third persons by the reassured. By the course of business, as any premium became due from one company to the other, the company entitled to the premium gave to the company owing it a receipt for the amount: on periodical settlements of account between P. and A., the premiums due on each side were taken into account, the balance struck, and paid by the party against whom it stood. No other payments passed between P. and A. A premium being due from P. to A., A. gave P. a receipt for the amount. At this time A. was indebted to P.: the amount of the premium went into the account in the usual course of business; and, at the next settlement, a balance was due from, and paid by, A. to P. Held: that the premium was paid at the time when the receipt was given.

ACTION against the defendant, duly appointed manager of The Athenæum Life Assurance Society, under The Joint Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45).

The first count charged that, before the granting the policies after mentioned, The Athenæum Life Assurance Society was established and united for the purpose (amongst others) of granting policies of assurance on the lives of parties desiring to insure in the said society: and, being so established, the said society, for the purpose of inducing parties more readily to insure in their said society, caused numerous prospectuses, notices, and advertisements to be issued, printed, and distributed, informing the public of their readiness to grant such *policies as [*184 aforesaid, and that, to insure the payment of the sums insured by such policies, whenever the said policies should become payable, they, the said Athenæum Life Assurance Society, had and were possessed of a capital stock of 100,000*l.*, out of which such policies, when granted by the said society, might, on becoming payable, be paid. That, before the making by the said Athenæum Life Assurance Society of the policy hereinafter next mentioned to have been made and granted by them, plaintiffs had, by a like policy of assurance made and granted by them, plaintiffs, numbered 1302, and bearing date (to wit) 20th day of August, 1854, assured the sum of 7000*l.* on the life of one Richard Paul Hase Jodrell, then of, &c. Of all which the said Athenæum Life Assurance Society had notice. That afterwards, to wit, on 20th August, 1854, one John Hornby, as the agent and for and on behalf of plaintiffs, proposed to effect an assurance with the said Athenæum Life Assurance Society in the sum of 6500*l.*, upon and for the whole continuance of the life of the said R. P. H. Jodrell. And afterwards, to wit, 20th August, 1854, by a certain instrument or policy of assurance then made and signed by three directors of the said Athenæum Life Assurance Society, and sealed with the common seal of the said society, after reciting that the said J. Hornby, as secretary for and on behalf of plaintiffs, and thereafter called the assured, had proposed to effect an assurance with the said Athenæum Life Assurance Society in the said sum of 6500*l.* upon and for the whole continuance of the life of the said R. P. H. Jodrell; and that the said John Hornby (as such agent for plaintiffs as aforesaid) had paid to the said society the sum of 308*l.* 15*s.* as a *premium or consideration for this assurance for one [*185 year, until 20th August, 1855: It was by the said policy witnessed that, if the said R. P. H. Jodrell should die before or upon 20th August, 1855, or should live beyond that day and the said assured and his assigns, or the holder of this policy, who should be registered as such in the book thereafter mentioned of the said society, should, on or before that day, and on or before 20th August in each and every successive year during the continuance of this assurance, pay to the said society the premium of 308*l.* 15*s.*, then the funds and other property of the said society should, according to the provisions of the deed of settlement of the said society, be subject and liable to pay to the assured, as such agent as aforesaid, and his assigns, or to the holder of this policy who should be registered as aforesaid, immediately after satisfactory proof of the death of the said R. P. H. Jodrell, and the further proof as hereinafter stated, the sum of 6500*l.* of lawful, &c. And it was thereby provided that the secretary of the said society should, upon the request of the holder of this policy, and with the consent of the said insured, register such holder in a book, &c. And it was further provided that the payment, as above mentioned, of the said sum of

6500*l.* to the holder of this policy who should be registered as aforesaid should be a good and sufficient discharge to the said society from and against any claims and demands upon and in respect of this policy. (The declaration then stated conditions for additional premium in certain cases, not now material.) And also that the capital stock, and other the stock, securities, funds, and property of the said society, *186] remaining, at the time of any claim or demand *made, unapplied, and undisposed of, and inapplicable to prior claims and demands, in pursuance of the provisions of the said deed of settlement, should alone be liable to answer and make good all claims and demands upon the said society or otherwise under or by virtue of the said reciting policy. And also that no director, officer, or shareholder of the said society, his heirs, executors, or administrators, should, by reason of this policy, be in anywise individually or personally liable, or subject to any such claims or demands, or be in anywise charged by reason thereof, beyond the amount unpaid of his shares in the said capital stock, nor longer than he should retain the same shares. And it was further agreed that all the above-mentioned conditions should be subject to the same conditions as those contained in the said policy of assurance of plaintiffs for 7000*l.*, numbered 1302, and dated 23d August, 1854, to the intent that the liability of the assurance so made by the Athenæum Life Assurance Society as aforesaid should be precisely the same as that of the plaintiffs so numbered 1302, as aforesaid. And that the sum assured by the now reciting policy should be immediately payable (if in force) upon proof being given that the plaintiffs had paid and discharged the sum assured by them by the policy so numbered 1302, above described. Averment: that the provisions of the deed of settlement of the Athenæum Society, having reference to the liability of the said society and its shareholders to pay the sums insured by the policies effected with the said society, are contained in the 28th clause of the said deed of settlement, which clause is in the words following:—"XXVIII. That every policy, endowment, grant of *187] *annuity, or other instrument required in any of the transactions aforesaid, shall be given under the hands of not less than three of the directors, and be sealed with the common seal of the society, and that there shall be contained therein and in every other contract to be entered into on behalf of the society, in or about the premises, a reference to these presents and a proviso limiting the scope and effect of the contract thereby created, so that the same shall take effect and be satisfied only out of such funds and property of the society as under the provisions hereafter contained shall, at the time at which such liability shall accrue, be at the disposal of the directors in that behalf, and negating an unconditional liability. Provided always that nothing herein or in such contract contained shall limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder under or by virtue of the aforesaid statute." Averment, that the conditions contained in the said policy of assurance, so made by them the plaintiffs and referred to as aforesaid as No. 1302, and dated 23d August, 1854, were in the words following. "Conditions of assurance and other regulations with regard to the same. First, no policy shall be considered in force beyond thirty days after the expiration of the period within mentioned for pay-

ment of the same, unless the premium then due shall have been paid at the office of the company, or to some one of the agents of the company. But, should proof be given, to the satisfaction of the board of directors, that the party or parties whose life or lives hath or have been assured continue in good health, the policy may be revived at any period [*188 *within twelve calendar months on the payment of the premium or premiums then due, with interest thereon at the rate of 5 pounds per centum per annum, and the payment of such a fine as the board of directors may think reasonable. Secondly, policies will become void," &c. (certain conditions; of which none but the following are now material). "Fourthly, that, subject to the above conditions, all policies are indisputable and indefeasible, except in cases of express fraud and of personation. Fifthly, all claimants, upon the death of any person whose life shall have been assured by the company, must, if required, make proof thereof, and give such further information respecting the same as the board of directors shall require." Averment: that, at the time of the making of the said policy by The Athenæum Life Assurance Society, and from thence until the time of the death of R. P. H. Jodrell hereafter mentioned, plaintiffs were interested in the life of R. P. H. Jodrell, to the amount (to wit) of 7000*l.*: and that they have paid, according to the said policy, all premiums, when and as the same became due and payable, under the said policy last mentioned, to The Athenæum Life Assurance Society, who duly accepted and received the same. And that the said respective policies of plaintiffs and the said Athenæum Life Assurance Society, so made as aforesaid, at the time of the said R. P. H. Jodrell's death, were then, and remained, in full force and effect. And that afterwards, to wit, on 12th November, 1855, R. P. H. Jodrell died. And that proof thereof was duly made to plaintiffs; and plaintiffs thereupon in due time paid to the holder of the policy, hereinbefore mentioned as granted by plaintiffs for 7000*l.*, No. 1302, and dated *the 23d August, 1854, the said sum of 7000*l.* That [*189 afterwards, to wit, on 18th August, 1856, proof of the death of R. P. H. Jodrell, and of the payment by plaintiffs of the said sum of 7000*l.* so payable by them on the said policy No. 1302, as aforesaid, was duly made to the directors of the said Athenæum Life Assurance Society, and received by them before the commencement of this suit, to wit, on the day and year last mentioned. And the said capital stock of 100,000*l.*, and other the stock, funds, securities, and property of the said Society, according to the provisions of the deed of settlement of the said society, and remaining unapplied and undisposed of and inapplicable to any prior claims and demands upon the said society or otherwise, in pursuance of the trusts, powers, and authorities therein contained, at the time when plaintiffs' claim accrued against the said Athenæum Life Assurance Society, were, and have always since the death of the said R. P. H. Jodrell hitherto been, sufficient to pay and satisfy to plaintiffs the said sum of 6500*l.* And nothing in the said conditions, regulations, or provisions has happened, or has been done by plaintiffs or any party or parties herein concerned, to disentitle plaintiffs to receive, but on the contrary everything in the said conditions, regulations, and provisions as aforesaid has happened, and everything has been done by plaintiffs and all parties herein concerned, to entitle plaintiffs to receive, in payment the said sum of 6500*l.*, so assured by the

policy granted by The Athenæum Life Assurance Society as aforesaid out of the said capital stock and other the stock, funds, securities, and property of the said society. Breach: non-payment by The Athenæum Life Assurance *Society, although requested, after proof of the death and of the payment by plaintiffs, out of the stock, &c., of the society or otherwise.

Second and third counts: similar claims, under two policies, of 2000*l.* each, assured by The Athenæum Life Assurance Society to plaintiffs, and by plaintiffs previously, on the life of R. P. H. Jodrell. Fourth count: for money lent, money paid, money received, money due on account stated, and interest.

The defendant pleaded fourteen pleas. Of the pleas to the first three counts the following only were ultimately insisted on.

1. That the said policies and agreements and conditions were not, nor was any of them, made by the said Athenæum Life Assurance Society.

4. As to so much of the declaration as alleged the provisions of the deed of settlement of The Athenæum Life Assurance Society: That the provisions of the said deed were not as alleged.

6. That plaintiffs did not pay, according to the said policies, the said premiums, when and as the same became due and payable, or any of such premiums as alleged.

7. That the said policies were not, at the time of the death of the said R. P. H. Jodrell, nor was any of them, in full force and effect.

14. That the said society was, at the time of the making of the said policies, respectively, a company, completely registered under and according to, &c. (7 & 8 Vict. c. 110); and that, by the deed of settlement of the said society, it was provided that every policy, endowment, grant of annuity, or other instrument *required in any of the transactions of the said society, should be given under the hands of not less than three of the directors, and be sealed with the common seal of the said society. That the said policies in the declaration mentioned were not given under the hands of not less than three of the directors and sealed with the common seal of the said society; nor were any or either of them so signed and sealed as aforesaid.

Issues thereon.

On the trial, before Wightman, J., at the London Sittings after Trinity Term, 1857, the deed of settlement of The Athenæum Life Assurance Society was put in evidence. It contained, among others, the following clauses.

"II. That the business of the society shall be to make and effect all or any assurances on lives or survivorships, or any contingencies relating to or connected with lives or survivorships, which may be effected according to law," &c. (other transactions mentioned), "and generally to carry on the business of life assurance," &c., "or in such of the said branches or departments only as the directors shall deem it expedient and advantageous to carry on such business respectively."

"XX. That a common seal shall be provided for the society bearing such device as the directors shall think proper, but the name of the society shall be inscribed thereon, and the directors shall have power to break and alter the same and to provide another seal in place thereof, and such seal shall be kept in some secure place selected by the directors, and such common seal shall not be affixed to any policies or other documents of the society, except by the order of three directors, signed

by them and countersigned by the manager, or *in his absence [*192 by such officer as the directors shall appoint."

"XXIV. That the directors shall meet at the principal offices of the society once at least in every week, and also at such other times (if any) as the chairman or any three directors shall require a meeting to be held, and that every such last-mentioned or special meeting shall be summoned," &c. (provisions for notice).

"XXV. That three directors shall constitute a board, and shall be competent to exercise the several powers and authorities hereby conferred on the directors generally, and that whether there shall or shall not be any vacancy or vacancies in the office of directors, or shall or shall not have been any irregular or void appointment or appointments, election or elections to such office, whereby the whole number of directors shall happen to be less than that provided for by or in accordance with these presents, but so that there always be at the least six directors of the society, and that three directors be present at the board."

"XXVII. That after complete registration, it shall be lawful for the directors of the society to effect assurance on lives and survivorships," &c. (the other transactions contemplated).

"XXVIII."—This was as set out in the declaration, *antè*, p. 186.

"XXX. Provided also, that if any premium upon any policy of assurance effected by the society upon any life or lives or contingency relating thereto, shall be unpaid for thirty days after the payments respectively shall have become due, every such policy respectively, and all payments theretofore made, and all claims on the *society in [*193 respect thereof shall be absolutely forfeited, but so nevertheless, that it shall be lawful for the directors if they shall think fit, but not otherwise, to remit such forfeiture, and to re-establish any such policy on such terms as may appear expedient, and so also that in case any person on whose life any such assurance shall be effected, shall die after the premium in respect of such assurances respectively shall have become due, but before the payment of such premiums, such assurances respectively shall, notwithstanding, be valid, provided the premiums thereon be paid within such term of thirty days."

"XXXI. That the directors shall out of the respective funds of the society, hereafter in that behalf mentioned, pay or cause to be paid all sums payable under any policy on any life or lives issued by the society, and not forfeited or avoided by any of the means aforesaid, within three calendar months after proof shall have been received at the principal office of the society to the satisfaction of the directors, of the occurrence of the death or other contingencies whereon the payment shall depend, and also like proof of the title and identity of the party claiming such payment." (Exceptions not now material.)

"XXXII. That it shall be lawful for the directors if they shall see fit on granting any policy, whether on any life or lives, or on granting any annuity determinable upon any life or lives, or on purchasing any interest so determinable, or on advancing money on any security dependent on the continuance or determination of any life or lives, to effect with any other assurance company such assurance on the said life or lives as to the said directors shall seem expedient."

"XXXVIII. That it shall be competent for the directors, [*194 and they are hereby empowered to alter," &c. (power to alter

and rescind contracts, compromise and refer disputes, prove debts, &c.), "and generally where these presents are silent, or do not otherwise provide, to act in the direction of the concerns of the society in such a manner as at their absolute discretion they shall think most conducive to the interest of the society, and for that purpose to make, do, and execute, all such acts, deeds, matters, and things whatsoever, as may be requisite or expedient in that behalf."

"LII. That the receipts in writing of any two of the directors of the society for the time being, countersigned by the manager, or of the trustees of the society for the time being, as the case may be, for any money belonging or payable to them respectively, or in respect of any property of the society, shall be sufficient discharges to the person or persons paying the same, and shall exonerate him or them from all liability of seeing to the application, or on account of the mis-application or non-application thereof, and from all necessity of inquiring into the expediency or regularity of any such sale, mortgage, transfer, or other transaction, in respect of which such money shall be payable, or whether such sale," &c., "has been authorized or not by the board of directors or by the society, or whether the trustees of the society or any of them, or the directors signing such receipts or any of them, are or is duly appointed or not."

"CI. That the books wherein the proceedings of the general meetings and of the board of directors are recorded, shall be kept at the principal offices of the *society, and shall be open to the inspection *195] of the shareholders at all reasonable times, subject, nevertheless, to the provisions of any by-law of the society."

It appeared that the three policies had been sealed with the seal of The Athenæum Life Assurance Society, and signed by three directors; one of whom, named Sutton, was the manager, and added to his signature the designation "Manager," simply. It appeared that no previous order by directors had been made for executing these policies, or indeed any of the society's policies. They contained all the provisions required by the XXVIIIth section of the deed of settlement. By a memorandum at the foot of each of the policies, signed by Sutton only, it was stated that the conditions of the policy should be subject to the same conditions as those contained in the policy corresponding granted by the plaintiffs on Jodrell's life, described in the declaration; and which, in each instance, was granted to a person named Truelock. The policy last mentioned, granted by plaintiffs, contained the condition as to the thirty days allowed for the payment of premiums mentioned in the declaration. The Prince of Wales Life and Educational Assurance Company and the Athenæum Life Assurance Society were in the habit of granting to each other policies, by way of reinsurance, covering wholly or partially assurances made by the grantee to third parties, such as the assurances granted in the present case by the plaintiffs in the first instance to Truelock on the life of Jodrell. By the course of business, no actual payments were made of the premiums by one society to the other, except at certain periods at which the accounts were balanced, when the party against whom the balance was paid it to *196] *the other party. But, as the several premiums became due, the officer of the party to which it was owing was in the habit of giving a receipt for the amount to the other party; and at the periodical

settlement of accounts the parties were credited and debited with the sums accordingly. In the present case, such receipts were given for the premiums on each of the policies within thirty days after they became due respectively, namely, in August and September, 1855; and the amounts formed items in the accounts as settled next thereafter, namely on 29th February, 1856, on which settlement the balance was against The Athenæum Life Assurance Society, and was paid by them to the plaintiffs. Jodrell had died in the interval between the giving of the last receipt and this settlement of accounts, namely on 12th November, 1855. It appeared, by the evidence of Hornby, the secretary to the plaintiffs, that, at the times when these receipts were given, the Athenæum Life Assurance Society was in debt to the plaintiffs. Truelock, upon Jodrell's death, claimed from the plaintiffs the sums due on the policies: and the plaintiffs, after consultation with, and upon the suggestion of, The Athenæum Life Assurance Society, resisted the claim, and, on behalf of that society, defended actions brought by Truelock. Truelock offered a compromise, which The Athenæum Life Assurance Society prevented the plaintiffs from accepting. Truelock recovered the full amount.

The defendant's counsel contended: First, that the policies were not duly executed by the Athenæum Life Assurance Society, for want of an order such as required by the XXth section of the deed of settlement; Secondly, that the plaintiffs were not entitled to thirty days' *grace for the payment of the premiums, that being allowable [*197 only if the conditions of the policies granted by the plaintiffs were incorporated into those granted by the Athenæum Life Assurance Society; which could not be effected by the memorandums at the foot of the policies, for want of authority to execute those memorandums; Thirdly, that the payments of the premiums were not in fact made within the thirty days.

The learned Judge directed a verdict for the plaintiffs, giving leave to move as after mentioned. In Michaelmas Term, 1857,

Sir *F. Kelly* obtained a rule calling on the plaintiff to show cause why a nonsuit should not be entered, or a new trial had, "on the grounds: 1st. That the directors have no authority to execute the policies, there having been no order to that effect signed by three directors and countersigned by the manager according to the deed of settlement; 2d. That the policies had expired, and no thirty days' grace allowed, unless by the memorandum at the foot of the policies, and that memorandum, which varies the terms of the policies, was unauthorized by three or any other number of directors, and signed only by Sutton, who had no authority; 3d. That the policies had expired by reason of the premiums not having been paid, the receipts having been given without authority, and without any money passing; and Jodrell (whose life was insured) having died on the 12th of November, the premiums still remaining unpaid, and the alleged settlement on the 29th of February, 1856, being wholly unauthorized by any board of directors or otherwise under the deed of settlement or policies."

*The case was argued in last Michaelmas (a) and Hilary (b) [*198 Terms.

(a) November 23d, 1857, before Lord Campbell, C. J., Coleridge, Wightman, and Erle, Ja.; and November 24th, before the same Judges.

(b) January 21st, 1858, before the same Judges.

Byles, Serjt., *Montague Smith*, and *F. Edwards* showed cause.—First, as between the plaintiffs and The Athenæum Society, the policies were binding, in spite of the XXth section of the deed of settlement of the society. Substantially, that provision has been complied with. There has indeed been no previous order: but the seal of the society has been affixed; and three directors, one of whom is the manager, have signed it. The signature of the manager is not the less the signature of a director because the same person happens to bear both characters. The case is like that of the same individual executing a deed to which he is a party in different characters, and in which he is mentioned as a party of the first part, and also of the third part, &c. The order may be contemporaneous with the affixing of the seal; and, if so, the joining in the policy is, in effect, making the order. But, supposing that what has taken place is not a compliance with the XXth section of the deed, the society are nevertheless bound. The society is constituted under stat. 7 & 8 Vict. c. 110: and completely registered; and, by sect. 7, the deed must, no doubt, be registered. [Lord CAMPBELL, C. J.—It will be argued that the party obtaining the insurance ought to look at the terms of the deed.] The defendant must go even further than that: he must contend that the party obtaining the insurance is bound to know what has in fact been done by the company granting the insurance.

*199] *The policy being good on its face, it cannot be open to the assurers to contend that they have not, in executing it, followed strictly the regulations which they have made among themselves for their own government. The creditors, who have not access to the books, have no means of knowing whether the regulations have been complied with or not. The XXVIIIth section of the deed does expressly provide for the form of the policy: it requires that there shall be the seal of the society and the signature of three directors; and these policies satisfy those requisites as well as the others contained in the XXVIIIth section. Sect. 44 of stat. 7 & 8 Vict. c. 110, prescribes the statutory requisites for contracts in general: and it does avoid contracts not possessing them; but it qualifies the avoidance so as to make the enactments inapplicable here: the words being, “that in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual (except as against the company on whose behalf the same shall have been made).” *Royal British Bank v. Turquand*, 6 E. & B. 327 (E. C. L. R. vol. 88),^(a) which has the sanction of the Judges of the three common law Courts, is directly in point for the plaintiffs: indeed it goes somewhat beyond what is required for this case, since there the making of the bond, on which the action was brought, was only incidentally applicable to the business of the defendant’s company; whereas here the granting insurances is the direct object of The Athenæum Life Assurance Society. In *Bill v. Darent Valley Railway Company*, 1 H. & N. 305,[†] the plaintiff sued the company for work and labour: and they pleaded that they were incorporated under an Act incorporating

*200] The Companies *Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); that the claim was for work done as secretary to the company; and that no determination as to his remuneration, or that of any secretary, had been exercised at a general meeting, as required by

(a) In Exch. Ch., affirming the judgment of Q. B. in *Royal British Bank v. Turquand*, 5 E. & B. 248 (E. C. L. R. vol. 85).

sect. 91. On demurrer to the replication, judgment was given for the plaintiff, for the badness, it is clear, of the plea. Bramwell, B., said: "These Acts of Parliament are construed as if they were partnership deeds. To violate them may be a breach of trust as between the directors and the shareholders; but acts not done according to them may bind the company. If the directors, without such authority, have agreed to give the plaintiff 500*l.* a year, they may have been guilty of a breach of trust, but that is all." In *Peddell v. Gwyn*, 1 H. & N. 590,† a similar defence was offered to *scire facias* brought against a shareholder on a judgment against a company. It was held that, whether or not the defence would have been good in the original action, which was on a bill of exchange accepted by the company, it was not available on *scire facias*. The decision therefore is not in point. But Martin, B., said, respecting the clause in the deed of settlement there relied on as showing that the directors were not authorized to accept: "I am inclined to think, however, that, as regards third parties, that provision is immaterial, and that a person who takes a bill accepted by the company is not bound to see that it is in a form authorized by the deed of settlement. The 45th section(a) expressly enacts, 'that if the directors are authorized by deed of settlement or by-law to issue or accept bills, they shall do so in the manner there prescribed;' and it would be strange to hold that where the directors of a *company have issued bills in the precise form given by the Act, [*201 the holders cannot recover because the directors have not issued the bills in a form which is not the form of a bill of exchange at all. A shareholder in these companies must submit to the ordinary consequences of a partner in an insolvent company, and it is more reasonable that he should suffer than an innocent party, who takes a bill which is in the form prescribed by the statute." There, it may be observed, no power to accept bills at all was given to the directors except according to a form which was not followed. In *Gordon v. Sea Fire Life Assurance Society*, 1 H. & N. 599,† the point was directly decided, in an action on a bill accepted by the agent of the same company. In *Greenwood's Case*, 3 De G. M. & G. 459,(b) there was a clause in a company's deed of settlement, the effect of which, it was contended, was to limit the liabilities of shareholders, to the amount of their shares, as between them and third parties: but Lord Cranworth, C., and the Lords Justices held that, supposing this the intention of the clause, it could not affect the right of creditors against shareholders. *Bargate v. Shortridge*, 5 H. L. Ca. 297, was an appeal to the House of Lords from the judgment of Romilly, M. R.(c) The House of Lords, Lord Cranworth, C., and Lord St. Leonards, differed: the judgment was therefore not disturbed. The deed of settlement had provided that no transfer of shares should be permitted, except upon notice to the directors, and on the consent thereto of a board of directors, to be signified by a *certificate [*202 signed by three directors. A shareholder sent the proper notices to the directors, and received a consent signed by three directors. In fact the notices had not been laid before a board, nor the consent of the board obtained. Afterwards, the shareholder was returned to the Stamp

(a) Of stat. 7 & 8 Vict. c. 110.

(b) Reversing the judgment of Stuart, V. C., in *In re The Sea, Fire, and Life Assurance Company*, 2 Sm. & G. 95.

(c) In *Shortridge v. Bosanquet*, 16 Beav. 84. See *Bosanquet v. Shortridge*, 1 Exch. 699.†

Office as having ceased to be a member; and the transferees were treated as shareholders. Subsequently, the directors strove to treat the original shareholder as still liable in that character, on account of the want of consent of the board. Romilly, M. R., held that they could not do so. Lord St. Leonards, who concurred with him, said: "I wish only to guard myself against being considered to hold that where, as in *Morgan's Case*,^(a) the directors of a company do an act which is clearly not within their power, and to which they never could by any form, or any ceremony, give vitality, such an act can be maintained. That is a question which in every case must stand upon its own merits, and it has no bearing upon the case now before your Lordships, which is one where the directors could, if they had thought proper to perform their duty, have given validity to every one of these transfers. They chose to neglect a portion of the proper forms and ceremonies, looking at the substance, which they never did lose sight of, but they entirely disregarded the form, and they have thus given interests to parties which these parties never could have had without their consent." [Lord CAMPBELL, C. J.—We must hold ourselves bound by the affirmance of the judgment in that case, though it was the result only of a division of *203] opinion. In that respect, the case is as in *Regina v. *Millis*, 10 Cl. & F. 534.] On the other side, reliance will be placed on the language of Lord Wensleydale in *Ernest v. Nicholls*, 6 H. L. Ca. 401, 418.^(b) He there points out that the Legislature considered that joint stock companies could not conveniently be treated as ordinary partnerships, and, on the other hand, would not be likely to obtain charters placing them in the precise position of corporations. He then goes on as follows. "The Legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders, by requiring the copartnership deed to be registered, certified by the directors, and made accessible to all; and, besides, including some clauses as to the management, as in the Act 7 & 8 Vict. c. 110, s. 7, &c. All persons, therefore, must take notice of the deed and the provisions of the Act. If they do not choose to acquaint themselves with the powers of the directors, it is their own fault, and if they give credit to any unauthorized persons they must be contented to look to them only, and not to the company at large. The stipulations of the deed, which restrict and regulate their authority, are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with. The contract binds the person making it, but no one else. Those provisions which give to *204] the directors discretionary powers of management, do not affect *strangers; and the shareholders are bound by the exercise of the discretion which they have consented to give. Other stipulations are directory merely, and do not constitute conditions to the exercise of the powers; but they form the subject of an action against the directors for the breach of their covenants expressed or implied in the deed. The great body of shareholders for whose protection these limitations of

(a) *Ex parte Morgan*, 1 Macn. & G. 225.

(b) Reversing the judgment of the Lords Justices in *Port of London Assurance Company's Case*, 5 De G. M. & G. 465.

authority are provided cannot be affected unless they are complied with. They can only act and contract through their directors, and the acts of the individual shareholders have no effect whatever on the company at large." These remarks were clearly extrajudicial: the case was one where the contract made was not in the ordinary course of the business of the company, and therefore not within the general law. It was a contract by one company to purchase the trade of another company. But his Lordship, even there, points out that some stipulations are directory merely. [ERLE, J.—Lord Wensleydale goes on to give examples showing that he considered the formalities to be essential.] He refers to *Ridley v. Plymouth Grinding and Baking Company*, 2 Exch. 711,† and *Kingsbridge Flour Mill Company v. Plymouth Grinding and Baking Company*, 2 Exch. 718.† But in those cases the contracts were not under seal; and, so far as they affect contracts made in the course of the company's proper business, they must be considered as overruled by *Smith v. The Hull Glass Company*, 11 Com. B. 897 (E. C. L. R. vol. 73), which agrees with *Reuter v. Electric Telegraph Company*, 6 E. & B. 341 (E. C. L. R. vol. 88). Some authorities will be found in *Bostock v. North Staffordshire Railway Company*, 4 E. & B. 798 (E. C. L. R. vol. 82).

*Next, as between these parties, the premiums were paid by their having been allowed in the mutual accounts, according to the course of dealing of the two. It is true that the balance was not struck till after the expiration of the thirty days: but the receipts were given within that period. It is indeed suggested, by the second ground mentioned in the rule *Nisi*, that the allowance of the thirty days' grace was unauthorized. If that is insisted upon, the answer is that the memorandum may be taken as part, and contemporaneous with the execution, of the policy itself: *Burgh v. Preston*, 8 T. R. 483, *Lyburn v. Warrington*, 1 Stark. N. P. C. 162 (E. C. L. R. vol. 2), *Keele v. Wheeler*, 7 M. & G. 665 (E. C. L. R. vol. 49); which brings the question to the first point.

Sir F. Thesiger, *Sir F. Kelly*, and *Field*, contra.—The society do not think it right to insist on the second ground in the rule *Nisi*.

As to the first ground. By sect. 7 of stat. 7 & 8 Vict. c. 110, the deed of settlement of a joint stock company fully registered under the Act (as this company was) must be registered; and it must make provision for such of the purposes set forth in Schedule (A.) as the nature and business of the company may require. By sect. 25 the powers of the company to enter into contracts, &c., are given, "subject nevertheless, with respect to all such powers and privileges, to the provisions of this Act, and subject also to the provisions of the deed of settlement of the company or any other special authority." Sect. 27 defines the powers of the directors, who are "to conduct and manage the affairs of the company according to the provisions and subject to the restrictions of this Act, *and of the deed of settlement, and of any by-law, and for that purpose to enter into all such contracts and do and execute all such acts and deeds as the circumstances may require;" "subject nevertheless to the provisions and restrictions of this Act, and to the provisions of the deed of settlement of the company or other special authority, but not so as to enable the shareholders to act in their own behalf in the ordinary management of the concerns of the company otherwise than by

means of directors." And among the purposes of the company set forth in Schedule (A.) is one, number 23, "for insuring the safe custody of the seal of the company, and for regulating the authority under which it is to be used." A party, therefore, who deals with a completely registered joint stock company knows that he is to look to the deed of settlement for the requisites essential to the authority of the directors to affix the seal. In this case sect. XX. of the deed required a previous order, signed by three directors and countersigned by the manager, or, in his absence, by some one appointed by the directors. Not only was no such order proved, but it was proved that none such had ever existed. The plaintiffs therefore cannot claim as upon a due execution of the policy. There is nothing in the law of joint stock companies varying the general rule that an agent having a limited authority cannot give to any party, to whom the limitation is known, a title by any act beyond the limitation. In all the cases it is laid down that the party contracting with the company is to look to the deed of settlement: *Royal British Bank v. Turquand*, 6 E. & B. 327, 332 (E. C. L. R. vol. 88); 5 E. & B. 248, 262 (E. C. L. R. vol. 85); *Smith v. The Hull Glass Company*, 11 Com. B. 897, 926, 927 (E. C. L. R. vol. 73); *Ridley v. Plymouth Grinding and Baking Company*, 2 Exch. 711, 717.† But for what *207] purpose is the deed to be looked at, except for that of ascertaining whether those professing to act for a company are authorized to do so? And, if the limitation of the authority must be noticed by the contractor, must he not notice whether it has been exceeded or not? [WIGHTMAN, J.—Must he go so far as to ascertain whether the persons professing to act as directors are directors in fact?] He must. His position is not different from that of one who, for instance, bargains with an agent for the sale of an estate, and who must ascertain for himself the extent of the agent's authority. Only a defect in the appointment, or a disqualification, would be cured by sect. 30 of stat. 7 & 8 Vict. c. 110. The plaintiffs rely upon *Smith v. The Hull Glass Company*, 11 Com. B. 897 (E. C. L. R. vol. 73). There the manager, who ordered the goods, ought strictly, according to the deed of settlement, to have had power delegated to him by the directors, which was not shown to have been done: but the goods, which were for the purposes of the trade of the company, were in fact used by the company in that trade: the mere user, without any order at all, would have bound the company. But the Court had the power to draw inference of facts, and, in effect, found that the requisites had been observed. That is consistent with *Ridley v. Plymouth Grinding and Baking Company*, 2 Exch. 711.† In *Smith v. The Hull Glass Company*, 8 Com. B. 668 (E. C. L. R. vol. 67), on the argument on the rule upon the first trial, Wilde, C. J., says that the *prima facie* implication of a contract by the directors "might have been rebutted by showing that the directors were restrained by the *208] deed," &c., "from making such contract on behalf of the *shareholders." That is shown here. As to *Royal British Bank v. Turquand*, 6 E. & B. 327 (E. C. L. R. vol. 88), 5 E. & B. 248 (E. C. L. R. vol. 85), it seems that both the Court of Exchequer Chamber and this Court inclined to think that the requisites of the deed of settlement had been complied with, in fact, by the resolution of the general meeting. And in that case there was no plea of *Non est factum*. The decision is, to a certain extent, explained by *Hill v. The Manchester and*

Salford Waterworks Company, 5 B. & Ad. 866 (E. C. L. R. vol. 27), where the effect of that plea was much discussed. But, in this last case, it was held that the act of the clerk, in affixing the seal under a general authority from the directors, was good, without their assent to the particular act. There had also been a resolution of proprietors authorizing the issue of the bonds to which the seal was attached. If there be any difference in the law between a limited permission and a direct prohibition of acting except under specified conditions, the distinction is in favour of the defendant; for the latter is the case here. Lord Wensleydale, in *Ernest v. Nicholls*, 6 H. L. C. 418, in the words noticed on the other side, lays down as strongly as possible the principle for which the defendant contends. It is true that the case was decided on another point: but the argument at the bar had been directed to the point to which Lord Wensleydale's remarks refer. *London Dock Company v. Sinnott*, 8 E. & B. 847 (E. C. L. R. vol. 92), also falls in with this view. The directors are merely agents with limited authority. [Lord CAMPBELL, C. J.—But suppose the agent exceeds his authority, and the principal ratifies?] Who is the principal here? Not the directors, surely: and there has been no ratification by any one else. * [Lord CAMPBELL, C. J.—In what way then could the principal [*209 ratify here?] In no way: the society has only a statutable existence, and can act only by the instrumentality which the statute confers. [ERLE, J., referred to *The Great Northern Railway Company v. The Eastern Counties Railway Company*.(a)] It may be that, where the contract is not illegal but simply ultra vires, an individual assenting to it may be personally estopped; but that is not the case here. [WIGHTMAN, J.—Suppose several persons who had contracted with the directors here had discovered the mistake of not having obtained a previous order, and a general meeting had been called, which had ratified the contracts.] Such ratification would be simply void: a general meeting could have no such authority, by sect. 27 of stat. 7 & 8 Vict. c. 110. But nothing like such a ratification appears here; there is not even a receipt of dividends. No ratification can have been effected by the request to resist Truelock's claim. The act of the directors is a direct violation of the prohibition of the deed of settlement, which must be considered as incorporated in stat. 7 & 8 Vict. c. 110. [Lord CAMPBELL, C. J.—Suppose you found a clause in the Act or the deed prescribing that no contract should be valid if not executed between the hours of two and three in the afternoon.] The injustice of so absurd a clause might perhaps raise a difficulty. [Lord CAMPBELL, C. J.—But does not that show that some provisions of a deed of settlement may be treated as directory? ERLE, J.—In *Chitty On the law of Contracts*, p. 254 (6th ed.), it is said: "A mere excess of authority by the directors will not be a defence to an *action" on a contract made by the directors, [*210 "unless it be also shown, that by such excess of authority they had prejudiced the shareholders, and that this was known to the other contracting party." And, soon after, he cites *Smith v. The Hull Glass Company*, 11 Com. B. 897 (E. C. L. R. vol. 73).] If the remarks already offered on that case are correct, the inference drawn by Mr. Chitty is too strong. [ERLE, J.—How do you answer the argument suggested by

(a) Before *Turner, V. C.*, cited in *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 11 Com. B. 803, 813 (E. C. L. R. vol. 73).

the exception in sect. 44 of stat. 7 & 8 Vict. c. 110, "except as against the company on whose behalf the same shall have been made?"] That protects parties dealing with the company from the effect of a non-compliance with the requisites of that section: but here those requisites have been observed. The section is, however, not very consistent with itself on any view. *Bargate v. Shortridge*, 5 H. L. Ca. 297, which has been referred to, arose, not on stat. 7 & 8 Vict. c. 110, but upon The Joint Stock Banking Companies Act, 7 G. 4, c. 46, which has no clauses restraining the power of the directors like those in stat. 7 & 8 Vict. c. 110. The directors had given the shareholder's transferee a certificate: this, it was held, estopped them; and they were not allowed to rely upon any irregularity in their own act. But, under stat. 7 & 8 Vict. c. 110, if directors act in direct violation of the express provision, nothing can affirm the act.

As to the payment of the premiums. The accounts were not balanced till after the expiration of thirty days from the premiums becoming due, and after Jodrell's death; and till that balance was taken, at any rate, there was no payment, because there was no allowance in account. *211] [WIGHTMAN, J.—Suppose a promissory note had been *given at the time.] That might have been accepted as payment: *Belshaw v. Bush*, 11 Com. B. 191 (E. C. L. R. vol. 73), *Kearslake v. Morgan*, 5 T. R. 513; or it might suspend the remedy. [Lord CAMPBELL, C. J.—If by the course of business, the giving and taking of the receipts operated as payments, the striking the balance was, so far as regards this point, immaterial.] The society had no power to give credit. *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

This action is brought against The Athenæum Life Assurance Society on three policies of insurance, alleged to have been executed by the society on the life of one Jodrell, deceased.

The defendant first relies on pleas of Non est factum, and that the society did not make and grant any of the policies as alleged. He pleads no plea alleging fraud or illegality, or that the shareholders had been in any degree prejudiced by the granting of the policies.

All the three policies were proved to be under the common seal of The Athenæum Life Assurance Society, and signed by three of the directors of the society, one of whom was the managing director. The defence set up under these pleas was, that the society was established under stat. 7 & 8 Vict. c. 110; that it was completely registered; that, by section XX. of the society's deed of settlement, it was declared, "That a common seal shall be provided for the society bearing such device as the directors shall think proper," "and such seal shall be kept *212] in some secure place selected by the directors, and *such common seal shall not be affixed to any policies or other documents of the society, except by the order of three directors, signed by them and countersigned by the manager, or in his absence by such officer as the directors shall appoint." And that, although the policies sued upon were sealed with the seal of the society by the three directors who signed them, there had not been a previous order of the three directors, signed by them and countersigned by the manager, or by an officer appointed by the directors to act for him in his absence. In point of

fact there had been no previous order for the execution of these policies, nor of any other policies ever before executed by the company.

The defendant's deed of settlement declared, by section XXVIII., "That every policy" "shall be given under the hands of not less than three of the directors, and be sealed with the common seal of the society, and that there shall be contained therein" "a proviso limiting the scope and effect of the contract thereby created, so that the same shall take effect and be satisfied only out of such funds and property of the society as under the provisions hereafter contained shall, at the time at which such liability shall accrue, be at the disposal of the directors in that behalf, and negating an unconditional liability." The three policies sued upon were all framed and executed according to this regulation. They bore date in August and September, 1854, and were known by the defendant's society to be reassurances in respect of policies executed by the plaintiffs on the life of Jodrell to one Truelock. The officers of the defendant's society had by several acts recognised the existence of the three policies executed by them, and also their liability upon these policies. And, Jodrell having died in November, *1855, and Truelock having sued the plaintiffs on the policies they had granted to [*213 him on Jodrell's life, the defendant's society came in to defend the action, for the assigned reason that they were ultimately liable; and they prevented the plaintiffs from agreeing to a compromise which Truelock had offered.

Under these circumstances, the defendant's counsel contended that they were entitled to have the verdict entered for them on the pleas of *Non est factum*, and that they had not granted the policies; that the previous order was a condition precedent to the power of the directors to affix the seal to the policies; so that, without proving such an order, a *prima facie* case could not be made out for the plaintiffs; that, for the want of previous orders signed by three directors and the manager under section XX. of the deed of settlement, the policies were absolute nullities, and were incapable of confirmation by the defendant's society, although the plaintiffs might have regularly paid and the society received the premiums upon them for twenty years; although the premiums during all that time might have increased the dividends received by the shareholders; and although the granting of the policies was within the scope of the general authority of the directors and for the benefit of the shareholders.

This reasoning proceeds upon the assumption that all who deal with the society have notice, before any negotiation begins, of the deed of settlement, and are bound to make themselves masters of all its contents. But, if it were established that all the world must be presumed to have notice of all the contents of all the deeds of settlement framed by all companies under stat. 7 & 8 Vict. c. 110, does it follow that a deed under the *seal of such a company, which is *bona fide* [*214 entered into, which is not contrary to the rules of the common law nor to any enactment in stat. 7 & Vict. c. 110, or in any other statute, and which, when executed, may have been for the benefit of the shareholders, is absolutely void if any formality has been omitted which is prescribed by the deed of settlement. If a deed under the seal of the company contains matter contrary to the deed of settlement of which the party dealing with the company has notice, and this works a preju-

dice to the shareholders, we do not doubt that the deed is illegal, and that it might be avoided by a special plea disclosing the illegality. But the simple omission of a formality or variation from a form required by an article in the deed of settlement does not, we conceive, make a deed under the seal of the company a nullity. We consider the direction in sect. XX. of this deed of settlement to be only for the guidance of the directors, and to be intended to operate only as between them and the shareholders. If, from neglecting it, any prejudice arises to the shareholders by too many risks being taken or in any other way, the directors may be liable to the shareholders: but this is very different from saying that a party who has *bonâ fide* insured a sum of money by such a deed on a life shall lose that money when the life drops, and shall lose all the premiums he has paid upon it more than six years back, although, when the policy was executed, it was an advantageous bargain for the shareholders. If a customer dealing with this society for a life policy is bound to inspect the deed of settlement at all, he surely has done enough if he attends to sect. XXVIII., which regulates the manner in which policies shall be framed and executed; and the policies in *215] question are in all respects framed and executed according to the rules there laid down. The deed of settlement declares (sect. II.) "that the business of the society shall be to make and effect all or any assurances on lives or survivorships, or any contingencies relating to or connected with lives or survivorships, which may be effected according to law;" and surely the granting of the three policies on which this action is brought must be considered within the scope of the authority of the directors.

If the party effecting the insurance is bound to take notice of the section XX. at all, may he not, when he receives his policy and pays the premiums, reasonably presume that the directors who sign it have done their duty, and that they had the preliminary order for executing the policy? In no one instance had it ever occurred to a party effecting a policy with this society to ask for the sight of such an order. But, according to the argument for the defendant, even a sight of an order *ex facie* regular would be no absolute security; for one of the names may be forged; and the officer who countersigns on this occasion, in the absence of the manager, may not have been duly appointed.

It is truly said that such regulations are introduced into the deed of settlement for the protection of the shareholders. But the shareholders have reasonable protection from them, without saying that any departure from the regulations must of necessity nullify the policy; for, if they are violated by the directors, the directors are answerable for the breach of them to the shareholders: and, if there has been an illegal agreement between the directors and the party effecting the policy, to the prejudice of the shareholders, the policy would be illegal; and by a special plea it might be avoided.

*216] *We must bear in mind that there are no nullifying words in the XXth section of the deed of settlement; and that they may well be considered as directory, instead of creating by implication a condition precedent which might work such enormous injustice.

Whenever a party dealing with such company knowingly combines with the directors to do any act *ultra vires* to the prejudice of the shareholders, as e. g., to throw upon them unlimited liability, whereas the

directors are required so to frame policies as to confine the remedy of the assured to the capital and funds in the hands of the company, the shareholders might very fairly and reasonably deny their liability on the policy. But it would be most unjust to allow them to take advantage of an irregularity of the directors (who are denominated their agents), although they cannot show that they are in any respect prejudiced by the irregularity, and the assured cannot be charged with any fraud or impropriety.

The question is, Did the Legislature mean that the company may avoid all their contracts unless the formalities prescribed by the statute and the deed of settlement, both in the form of the contract and in the process of making it, have been complied with?

In support of the affirmative, it is said that the directors are agents with limited authority; that the contractors have notice of the limits, because the statute confers the authority subject to the provisions of the Act and the deed of settlement which is registered for public inspection; that the shareholders are the principals; and that they have an unlimited power of repudiation, although this would be an unlimited power to defraud.

*Conceding the impossible supposition, that every contractor has read and understood all its provisions, the statute relied upon [*217] would have effect if these provisions were held to create a duty inter se of directors and shareholders, and thus enabling the company to avoid contracts in which some of the provisions are not complied with, if the contractor, with actual notice of the provisions, has knowingly combined with the directors to omit them, to the prejudice of the shareholders, as in the case of partnership deeds.

The leading purpose of the statute is to enable a permanent company, consisting of changing shareholders, to make binding contracts, and sue and be sued, and do all the usual acts necessary for carrying on trade. The preamble expresses an intention to invest them with the qualities and incidents of corporations, with some modifications, and subject to some provisions and regulations. The earlier sections provide for the course of formation by a provisional registration of a deed of settlement; the essential requisites of such deed, according to sect. 7 and Schedule (A.), relate almost exclusively to the rights and duties of directors and shareholders inter se, regulating the capital, the shares, the meetings, and the proceedings of the company. The IVth clause of Schedule (A.), relating to the borrowing of money, is adapted to the same purpose, and not to the confirmation of a tender. Then the 36th item is to determine whether the directors may contract debts; and, if so, whether to a definite extent: and the 37th and 38th items are to determine to what extent the directors may issue money notes, or accept bills of exchange. If they may contract debts and bind by negotiable instruments, the Legislature can scarcely *have intended that a creditor would be defeated if the liability created is beyond the defined extent, as [*218] the extent can only be ascertained by taking an entire account of the concern; but the Legislature may well have intended to fix a duty on directors which the shareholders examining the yearly accounts could enforce.

After registration of the deed of settlement a certificate of complete registration is to be granted; and thereupon, by sect. 25, the company

becomes incorporated for the purpose of carrying on the business, but only according to the provisions of the Act and of the deed. By this section various powers are conferred; and the 12th power is, "to perform all other acts necessary for carrying into effect the purposes of such company, and in all respects as other partnerships are entitled to do."

Then sect. 26 defines some rights and duties of shareholders; and sect. 27 some rights and duties of directors, who are to manage the affairs of the company, and for that purpose to enter into all such contracts as circumstances may require; with a proviso that shareholders are not to act in the management of the concerns of the company otherwise than by means of directors. Thus a partnership is formed, which in some respects is incorporated, in which the shareholders are dormant and the directors are the acting partners. The subject-matter of the contracts of this partnership must be *infra vires*, that is, within the scope of the partnership. And for the form of their contracts provision is made in sect. 44, which enacts that contracts, except those for services or goods not exceeding 50*l.*, shall be in writing signed by two directors, and sealed; and that, in the absence of any of such requisites, "such contract shall be void and ineffectual (*except as against the* *219] *company on whose behalf the same shall have been made*"). Contracts for services or goods not exceeding 50*l.* may be entered into by an officer authorized by a by-law; and all contracts shall be reported to the secretary, and registered, under a penalty for default.

This language of the Legislature creates a duty on the directors towards the shareholders to comply with the specified formalities: but we think it intends that the absence of the prescribed formality shall not render the contract void as against the company.

In other parts of this statute some contracts are made absolutely unlawful, as by sect. 23 various contracts of companies provisionally registered, and by sect. 25 various contracts of companies who are required to obtain an Act of Parliament before acting. These sections relate to the subject-matter of the contract: and they prohibit without qualification. Sect. 44, relating to formalities, annuls, but with the very important exception of parties seeking to enforce them against the company.

If the formalities required by sect. 44 are complied with, the state of the affairs of the company can be easily examined. This section has an operative effect in creating a duty of the directors; and sect. 31 gives a stringent remedy for some breaches of duty by directors, enacting that a director wrongfully doing or omitting any act with intent to defraud a shareholder shall be guilty of a misdemeanour.

It is further to be observed, that the right of inspecting registered documents is conferred on the *public* by sect. 18, while the right of inspecting the books of the company is, by sect. 33, conferred on *shareholders* only. In the present case the deed requires a resolution *220] of three *directors* as a formality previous to making a policy. If the statute is taken to have intended that such a stipulation could make the policy void unless there was the previous resolution, it would seem to follow that the party assured should have the right of searching the books for the resolution. But the resolutions in the books

are for the examination of the shareholders only, that they may call the directors to account in case of need.

Therefore we are of opinion that, according to the sound principles of law and the just construction of the statute, if there had been a clause in the deed of settlement prohibiting the directors from executing any deed unless the deed be engrossed on vellum, and an action were brought against the company on a deed proved to be under the seal of the company and not liable to any other objection, the defendant would not be entitled to a verdict under a plea of *Non est factum* on proof that the deed was engrossed on parchment instead of vellum.

We likewise think that the weight of authority greatly preponderates in favour of this conclusion. *Ridley v. Plymouth Grinding and Baking Company*, 2 Exch. 711,† and the class of cases to which it belongs, where there was no contract under seal, do not seem to us to apply; and one of the learned Judges who concurred in *Ridley v. Plymouth Grinding and Baking Company*, seems to intimate an opinion that, if there had been a contract under the seal of the company, the company would have been bound.

The case chiefly relied upon by the defendant's *counsel was [*221 *Ernest v. Nicholls*, 6 H. L. Ca. 401. We are of course bound by the judgment of the House of Lords in that case: and we should all most heartily have concurred in it, the question having been as to a special contract to do the very unusual thing of purchasing by one company the trade of another. But we are not bound by the extrajudicial observations of any noble and learned Lord delivered in that assembly, although they are, no doubt, entitled to high consideration. *Smith v. The Hull Glass Company*, 8 Com. B. 668 (E. C. L. R. vol. 65), 11 Com. B. 897 (E. C. L. R. vol. 73), seems to us to be at variance with the dicta quoted to us. Maule, J., there says (11 Com. B. 927 (E. C. L. R. vol. 73)) that, although persons who contract with directors acting under stat. 7 & 8 Vict. c. 110, must be taken to be cognisant of the extent of the authority conferred upon them, "it by no means follows that they are to be taken to be cognisant of all the proceedings of the board of directors."

Hill v. The Manchester and Salford Waterworks Company, 2 B. & Ad. 544 (E. C. L. R. vol. 22), (a) although not on the construction of stat. 7 & 8 Vict. c. 110, is strong to confirm the general rule that an instrument under seal, which is *prima facie* valid, can only be avoided by plea alleging fraud or illegality. Lord Tenterden there says: (b) "If the defendants meant to insist that the bonds were given for purposes unsanctioned by the Act, and also prejudicial to the shareholders and mortgagees, that ought to have been shown. The pleas, as framed, lay no sufficient ground for the argument of illegality." Parke, J., adds: "I am also of opinion that the pleas are insufficient." "It was for the *company, if they disputed their liability, to open the [*222 estoppel arising from their own admissions, by showing that the consideration of the bonds was illegal, or inconsistent with the statutes under which they acted." *Horton v. Westminster Improvement Commissioners*, 7 Exch. 780,† is to the like effect.

(a) See *Hill v. The Manchester and Salford Waterworks Company*, 5 B. & Ad. 866 (E. C. L. R. vol. 27).

(b) 2 B. & Ad. 552.

But *Royal British Bank v. Turquand*, 5 E. & B. 248 (E. C. L. R. vol. 85), (a) did turn upon the construction of stat. 7 & 8 Vict. c. 110, and appears to us to be expressly in point and conclusive as to the question of law which we have now to determine. So it was considered by the judgment of the Court of Common Pleas in the recent case of *Agar v. The Athenæum Life Assurance Society*, 3 Com. B. N. S. 725 (E. C. L. R. vol. 91), the very company now sued; in which the Judges of that Court unanimously held that a departure from the formalities required by the deed of settlement of that company did not affect the validity of any contract under the seal of the company, and that the case in all its points fell within the general rule that a corporation is bound by deed under seal affixed in due form, unless it can establish illegality or fraud.

So, in the recent case of *Bill v. Darenth Valley Railway Company*, 1 H. & N. 305,† it was laid down by the Court of Exchequer that “these Acts of Parliament are to be construed as if they were partnership deeds. To violate them may be breach of trust as between the directors and the shareholders; but acts not done according to them may bind the company.”

The same dictum is enunciated by Lord St. Leonards in *Bargate v. Shortridge*, 5 H. L. Ca. 297.

*223] “For these reasons, and on these authorities, we think that, notwithstanding the dicta of the noble and learned Lords referred to, the verdict for the plaintiffs on the pleas of *Non est factum*, and that the defendants’ company did not grant the policies, ought not to be disturbed.

The plea that the policies had expired before the death of Jodrell being abandoned as wholly untenable, we have only further to consider the plea still relied upon, that the premiums had not been paid within the thirty days’ grace.

It appears that there were mutual accounts between the two insurance companies (the plaintiffs’ and the defendant’s), upon cross insurances; and that it was their course of dealing to give each other credit for premiums due, and to give receipts accordingly, as if the premiums were actually paid in cash at the time of the receipts being given; the accounts between the companies being from time to time settled, and the balance struck, and payments made, or securities given, on account of the balance. In the present case, the premiums which became due upon the three policies in question in August and September, 1855, were not paid by the plaintiffs to the defendant’s society in cash; but, within the thirty days of grace upon each policy, receipts were given by defendant’s society to plaintiffs as if the premiums had been paid at the time of the receipts: and the amount of those premiums became items in the mutual account between them; which account was settled and the balance paid by the defendant’s society to the plaintiffs in February, 1856; which balance included the items for premiums upon the policies in

*224] question payable in August and September, 1855. Jodrell *had died in the intermediate time, on 12th November, 1855; but that circumstance does not appear to us to make any difference. We think that, by agreement between the two companies, the premiums were taken to have been paid on the day the receipts were given; and the defend-

(a) In error, 6 E. & B. 327 (E. C. L. R. vol. 88).

ant's society, who had the full benefit of that course of dealing, as the balance was usually against them, now that the whole amount due upon the whole account has been paid, cannot turn round upon the plaintiffs and say that they were not paid at the time in cash. It appears, by the evidence of Mr. Hornby, that, in August, 1855, when the receipts were given for the premium on the policy for 6500*l.*, the defendant's society was indebted to the plaintiffs in 700*l.*; and the amount of the premium was taken as on payment in account, and in reduction of the amount due from the defendant's society to the plaintiffs. During the month of September, when the premiums upon the other policies became due, and when the receipts for the premiums upon those policies were given, the cash balance was always in the plaintiffs' favour; and the amount of those premiums went in reduction of the debt of the defendant's society, and was taken as payment of so much in account, and, in effect, was payment of the premiums at the time the entries of those payments were made to the credit of the defendant's society in account with the plaintiffs. There is nothing in the deed of settlement which prohibits such mutual account between the plaintiffs and defendant's society as those in question. If any authority was necessary to be given to enable the officers of the defendant's society to receive payments of premiums by way of set-off in account, how could the plaintiffs know that they had *not such authority, after the long course [*225 of dealing between the two companies which was proved to have existed in the present case?

Upon the whole, then, we are of opinion that the premiums were in effect paid by the plaintiffs within the thirty days of grace, and that there is no sufficient reason for disturbing the verdict upon that ground.

Therefore we think that the plaintiffs were entitled to a verdict on all the issues joined; and that the present rule must be discharged.

Rule discharged.

The Justices of LANCASHIRE, Appellants, *v.* The Overseers of STRETFORD, Respondents. *May 1.*

Buildings were provided by justices of a county, under stats. 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, for a police district of a county. The furniture belonged to the justices, who paid for it out of the police-rate. The buildings consisted of premises used exclusively for the police offices, cells, and rooms for the residence and accommodation of the police serjeant and constables, who resided there (one of them with his wife), and had a deduction made from their wages in respect of the rent: but they enjoyed no accommodation more than was necessary for their convenient occupation in their official capacity, and for the purposes for which they were placed there.

Held, that the buildings were occupied exclusively for public purposes, and the justices were not rateable to the poor in respect thereof.

THE JUSTICES of Lancashire having appealed against the undermentioned rate, a case was, by consent of parties and order of Coleridge, J., stated for the opinion of this Court under stat. 12 & 13 Vict. c. 45. s. 11.

The rate was made on 10th September 1857, for the relief of the poor of the township of Stretford in Lancashire, and was as follows.

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name or situation of Property.	Gross estimated rental.	Rateable value.	Rate at 1s. in the pound.
769	Police Station.	County Constabulary.	House and Station.		£20.	£18.	18s.

*226] *The following facts were stated in the case.

The county constabulary for the said county is appointed under stat. 2 & 3 Vict. c. 93.

The county was divided into police districts: and station-houses and strong rooms were provided under stat. 3 & 4 Vict. c. 88.(a) The township of Stretford is situated in one of these police districts.

The premises in question consist of a station-house and strong rooms, and comprise, on the ground floor, the serjeant's office, the constables' day-room, two cells or strong rooms, a small outhouse used for a privy, and connected with the building itself, the serjeant's living-room, a scullery, and a pantry; and on the first floor there are four bed-rooms. All the premises are for the sole use of the police force necessarily stationed at the premises for the purposes of the county constabulary.

The whole of the furniture, with the exception of that part in the personal use of the serjeant and his wife, belongs to and is provided by the justices of the county out of the police-rate, and solely for the purposes of the county constabulary.

One serjeant, one first-class constable, and one third-class constable, of the county constabulary are stationed at Stretford, and reside upon the premises in question. The serjeant is a married man: and his wife resides with him: but they have no children. They occupy as their apartments the living-room, scullery, pantry, and one bed-room. The other constables are single men. Each occupies one of the bed-rooms; and they have their meals in the constables' day-room. The three constables are required to be stationed there, and to reside within the walls for the purposes of the county constabulary. Nothing more is provided

*227] than is *necessary for their convenient accommodation; nor does the accommodation in any way exceed what is suitable and requisite for their respective degrees in life. But, on the contrary, the accommodation provided for them is such only and no more than is necessary for their convenient accommodation in their official capacity, and for the purposes for which they are placed there.

The serjeant's wages are 68*l.* 8*s.* 9*d.* per annum, payable by forty-eight equal instalments: but a deduction, as a charge for rent, is made therefrom of 6*l.* 10*s.* in respect of his occupation of part of the premises in question as above stated. The first-class constable's wages are 51*l.* 14*s.* 2*d.*; and the third-class constable's wages are 45*l.* 12*s.* 6*d.* per annum: but a deduction, as a charge for rent, is made therefrom of 2*l.* 12*s.* in respect of the occupation, of each, of part of the premises in question as above stated. The deductions from wages are only applicable, and can only be applied, in aid of the police-rate of the district, and entirely, and without any exception, for public purposes. Neither the justices nor the constabulary force derive any benefit therefrom.

All the purposes of the Acts under which the county constabulary is provided, to which any revenue whatever is applicable, are of a public nature.

If the premises are liable to be rated, the rate will have to be paid out of the police-rate.

The question for the opinion of the Court is: Whether the said Justices or the county constabulary are liable to be rated and assessed towards the relief of the poor in respect of the said premises, or any part of them; and, if they are, in respect of what part or parts.

**Monk*, for the respondents.—The appellants contend that [228 there is no occupation except for public purposes. [Lord CAMPBELL, C. J.—You do not rely upon the justices being the beneficial occupiers for their own purposes.] No. The respondents contend that the occupation is not exclusively for public purposes, and that some of the purposes are at any rate not coextensive with the police district. The occupation by the police officers who reside on the premises is like an occupation by a coachman in and for the service of his employer; and for this the justices should be rated. [CROMPTON, J.—There the party rated derives a benefit from the occupation.] The actual occupation here is by the chief constable. The public purpose relied upon is the preservation of the peace by the police: but that produces a local benefit only in the district, not a public one, even for the whole county. In *Regina v. Harrowgate Commissioners*, 15 Q. B. 1012, 1020 (E. C. L. R. vol. 69), Coleridge, J., said: “The distinction drawn in *Regina v. Badcock*, 6 Q. B. 787, 800 (E. C. L. R. vol. 51), between cases in which the exception has and in which it has not prevailed furnishes a good rule for our decision: ‘In all the first class, the public, as such, unlimited by the bounds of county, borough, or parish, had a substantial and direct interest in the benefit which the application of the funds produced; in the latter, the ratepayers, or at most the inhabitants of certain parishes, were alone concerned in the benefit, direct or indirect.’” [CROMPTON, J.—The preservation of the peace at Manchester benefits Liverpool. ERLE, J.—Is it not a case in which the whole kingdom is benefited?] Not directly. [Lord CAMPBELL, C. J.—The *punishment of [229 theft is a national object.] That might have been urged, in *Gambier v. Overseers of Lydford*, 3 E. & B. 346 (E. C. L. R. vol. 77), against rating the chaplain, medical officers, and other persons employed in the prison, for their occupation of buildings outside of the prison: but they were held to be rateable. The expenses are defrayed, not from a general public fund, but from the county police-rate. [ERLE, J., referred to *Regina v. The Justices of Worcestershire*, 11 A. & E. 57 (E. C. L. R. vol. 39).] No doubt it was there held that justices, as a body, could not be rated as beneficial occupiers of property vested in them, by a local Act, for the purpose of providing assize courts and accommodation for the Judges of assize: and the rule was taken as indisputable in *Hodgson v. Local Board of Health of Carlisle*, 8 E. & B. 116 (E. C. L. R. vol. 92). But here the premises are in effect let to those who occupy them, and who pay rent in the form of a deduction from their wages. [ERLE, J.—Certainly the general rule has been to treat the administration of justice as a public purpose.] A harbour for facilitating imports and exports serves a public purpose, in as wide a sense. [ERLE, J.—It is for the particular benefit of the mercantile interest.]

R. Assheton Cross, contrà, was not called upon.

Lord CAMPBELL, C. J.—I cannot see an answer to the objection which is made on the ground of there being no beneficial occupation. The justices are not beneficial occupiers; neither is the chief constable. Then are the police constables so? They occupy the premises for the *230] protection of the public; and the station is exempt *from rate on the principle which exempts courts of justice.

(WIGHTMAN, J., was absent.)

ERLE, J.—The administration of the police is a matter in which the public have an interest. These premises are held, therefore, for public purposes, as they cannot lawfully be applied to any profit on which a rate can be made. The rent, it is true, is deducted from the wages: but it is in the nature of wages.

CROMPTON, J.—I think this case falls within the late decisions: *Gambier v. Overseers of Lydford*, 3 E. & B. 846 (E. C. L. R. vol. 77), *Hodgson v. Local Board of Health of Carlisle*, 8 E. & B. 116 (E. C. L. R. vol. 92), and *Regina v. The Justices of Worcestershire*, 11 A. & E. 57 (E. C. L. R. vol. 39). It always struck me that the principle was exactly as stated in the passage cited from *Regina v. Harrowgate Commissioners*, 6 Q. B. 800 (E. C. L. R. vol. 51). This Court has, in *Gambier v. Overseers of Lydford*, distinguished between the case of a farm and the case of a gaol: but the principle has always been asserted and acted upon. Appeal allowed.

*231] *The QUEEN v. The Inhabitants of CREDITON. May 1.

For the purpose of showing a birth settlement in C., a witness was called who proved that she was the sister of the pauper's mother, who was the witness's senior by ten years; that the witness first remembered herself and the pauper's mother living with their parents in C. It was also proved that the father and mother of the pauper's mother were married in C., and that the witness afore mentioned, the pauper's mother, and another sister, were baptized in C. Held, sufficient evidence.

Orders of adjudication and maintenance, made by justices of the city and county of E. in the county of D., under stat. 16 & 17 Vict. c. 97, s. 97, recited an order of justices of E., made in pursuance of the statute, whereby F. (the person to whom the adjudication related), being neither a pauper nor wandering, but a person not under proper care and control, and a proper person to be taken charge of and detained, was "duly sent" from S. in E., to the lunatic asylum in the county of D.; and recited further that the said F. had been confined therein to the then present day "as such pauper lunatic," and still remained there at the charge of S.; and that complaint had been made by the parish officers of S., that F. was not legally settled in S. The order then adjudicated that the settlement was in C., and ordered C. to pay maintenance, &c.

It was objected that the jurisdiction of the justices, to make the order sending F. to the asylum, did not appear in the recited order; that it was not expressly found that F. was a lunatic, nor that the asylum to which F. was sent was that to which she ought to have been sent, nor how F. became chargeable to S.

Held, that the jurisdiction to make the order of adjudication and maintenance sufficiently appeared, it not being shown that the recited order did not contain all proper requisites; and, *semble*, that the mere fact of the lunatic being found in the asylum, at the charge of S., gave the justices jurisdiction to make the orders of adjudication and maintenance.

C. was a parish in an Union. The order of maintenance was addressed to the board of Guardians and their clerk, and recited an application by the parish officers of S. for an order on the clerk for payment of the expenses; and it then ordered the clerk to pay.

Held, that this was, in substance, an order on the Guardians.

ON appeal, at the Quarter Sessions for the city and county of Exeter,

by the overseers of the parish of Crediton in Devonshire, against an order of two justices, adjudicating the settlement of Elizabeth Folks to be in Crediton, and another order of the same two justices for the maintenance of the pauper, the Recorder confirmed both orders, subject to a case.

The order of adjudication was as follows :

"City and county of the city of Exeter, to wit. Whereas, under and by virtue of a certain order, bearing date the 26th day of August in the year of our Lord 1854, under the hands of John Daw, Mayor, and William Wills Hooper, Esquires, two of Her Majesty's justices of the peace acting in and for the city and county *of the city of Exeter, made pursuant to the provisions of the Act of Parlia- [*232 ment made," &c. (16 & 17 Vict. c. 97), "Elizabeth Folks, then resident in the parish of St. David in the city and county of the city of Exeter, being neither a pauper nor wandering, but a person not under proper care and control, and a proper person to be taken charge of and detained, was, on the 26th day of the said month of August, 1854, duly sent from the said parish of St. David in the county of the said city to the county lunatic asylum for the county of Devon, established at Exminster in the said county of Devon; and the said E. Folks has been confined therein, as such pauper lunatic, from the said 26th day of August to this day at the charge of the said parish of St. David; and she now remains in the last-mentioned asylum at the charge of the last-mentioned parish. And whereas complaint has been this day made to us the undersigned," &c., "two of Her Majesty's justices of the peace in and for the said city and county of the city of Exeter, from which such lunatic was sent to the said asylum for the said county of Devon by the churchwardens and overseers of the poor of the said parish of St. David, that the said E. Folks is not legally settled in the said parish of St. David: and we, the said justices, being justices for the said city and county of the city of Exeter, and from which such lunatic was sent to the said asylum as aforesaid, having now inquired into the place of the last legal settlement of the said E. Folks, so being a lunatic confined in such last-mentioned asylum, and having now obtained satisfactory evidence on oath that the last legal settlement of the said E. Folks was and is in the parish of Crediton in the county of Devon, do, by this our order under our hands and seals, adjudge that the *place of the last legal settlement of [*233 her the said E. Folks was, at the time of her being so as aforesaid sent to the said lunatic asylum for the said county of Devon, and from thence hitherto hath been, and still is, in the said parish of Crediton. Given under our hands and seals at the Guildhall in the city of Exeter, the 13th day of March in the year of our Lord 1857.

"HENRY HOOPER (L. S.), } Justices."
 "W. BUCKINGHAM, Mayor, }

The order of maintenance was as follows :

"To the Board of Guardians of the Crediton Union in the county of Devon, and to their clerk, and to the churchwardens and overseers of the poor of the parish of St. David in the city and county of the city of Exeter.

"City and county of the city of Exeter, to wit. Whereas, under and by virtue of a certain order bearing date the 26th of August in the year of our Lord 1854, under the hands of John Daw, Mayor, and William

Wills Hooper, Esquires, two of Her Majesty's justices of the peace in and for the city and county of the city of Exeter, made pursuant to the provisions of the Act of Parliament made" (16 & 17 Vict. c. 97), "Elizabeth Folks, residing in the parish of St. David within the said city and county, a lunatic (being neither a pauper nor wandering, but not under proper care and control), and a proper person to be taken charge of and detained under care and treatment, was, on the said 26th day of the said month of August, duly sent from the said parish of St. David in the said city to the county lunatic asylum for the county of Devon, established at Exminster in the said county of Devon; and the said Elizabeth Folks has been confined therein, as such pauper lunatic, from the said 26th day of August, 1854, to this day at *234] the charge *of the said parish of St. David; and she now remains in the last-mentioned asylum at the charge of the last-mentioned parish. And whereas, by a certain order of adjudication bearing date this present 13th day of March, 1857, and hereto annexed, under the hands and seals of us the undersigned, William Buckingham, Mayor, and Henry Hooper, two of Her Majesty's justices of the peace in and for the said city and county, and from which such lunatic was sent to the said asylum, we have duly adjudged that the place of the last legal settlement of the said E. Folks was, at the time of her being so as aforesaid sent to the county lunatic asylum for the said county of Devon, and from thence hitherto hath been, and still is, in the parish of Crediton in the said county of Devon; and whereas the said parish of Crediton is one of the parishes included and comprised in the Crediton Union aforesaid; and whereas complaint hath been made to us, the said justices, by the said churchwardens and overseers of the poor of the said parish of St. David aforesaid, that they, on behalf of the said parish of St. David aforesaid, have incurred great expense in and about the examination of the said E. Folks, and in and about her conveyance to the said asylum, and that they have paid divers sums of money to the treasurer of the said asylum for the lodging, maintenance, medicine, clothing, and care of the said E. Folks in the said asylum: and the said churchwardens and overseers of the poor of the parish of St. David aforesaid therefore now make application to us, the said justices, for an order upon the clerk of the guardians of the poor of the said Crediton Union, in which the said parish of Crediton is situate, included, and comprised as aforesaid, for *235] payment to the said churchwardens and overseers of *the poor of the said parish of St. David of the amount of the said expenses, and of the moneys so paid by them to the treasurer of the said asylum as aforesaid; and it being now satisfactorily proved to us, the said justices, upon oath, that the said churchwardens and overseers of the poor of the said parish of St. David have heretofore, and within twelve calendar months next before the making of this order, paid the following sums in respect of the said pauper lunatic," &c. (2*l.* 7*s.* in and about the examination and conveying to the asylum; 25*l.* 3*s.* 9*d.*, the balance of sums paid to the treasurer of the asylum for lodging, maintenance, &c.): "we do therefore order you, the clerk of the guardians of the poor of the said Crediton Union, in which said union the said parish of Crediton is situate, included, and comprised, and that being the parish in which the said E. Folks is adjudged to be settled as aforesaid, forthwith to pay to the said churchwardens and overseers of the

poor of the said parish of St. David, or some person or persons authorized by them, the said several sums of 2*l.* 7*s.* and 25*l.* 3*s.* 9*d.*, making together the sum of 27*l.* 10*s.* 9*d.* And we do also, in pursuance of the said Act of Parliament, further order you, the said clerk of the guardians of the poor of the Union aforesaid, or the clerk for the time being, to pay from time to time, on behalf of the said parish of Crediton, unto the treasurer for the time being of the said county lunatic asylum for the county of Devon the weekly sum of 12*s.* 6*d.*; the same being duly proved to us upon oath to be reasonable charges for the future lodging, maintenance, medicine, clothing, and care of the said E. Folks in the said asylum for the said county of Devon. And we do further order you the said clerk," &c. *(times of payment). Signed and sealed [*236 by W. Buckingham, Mayor, and Henry Hooper, Justices.

The lunatic, Elizabeth Folks, was the lawful daughter of John Folks and Betty Traies. The respondents relied on a birth settlement of the said Betty Traies, in the said parish of Crediton, as conferring a derivative settlement in that parish on the said lunatic. The appellants, by their grounds of appeal, denied this settlement, and also set up a subsequent settlement, acquired by the said lunatic by hiring and service in the parish of St. Thomas the Apostle, in Devonshire. The respondents proved the marriage of Samuel Traies and Sarah Harris, the father and the mother of the said Betty Traies, in the parish of Crediton, on July 26th, 1779; the baptism of the said Betty Traies, in the parish church of Crediton, on June 9th, 1780; the baptism of Joanna Traies, in that parish, sister of the said Betty Traies, in 1782; the baptism of Sarah Traies, in that parish, also sister of the said Betty Traies, 1790. And they also proved, by the said Sarah Traies, that she first remembered herself living in Crediton, with her said father and mother: and that her sister, the said Betty Traies, was then living there with them as part of the family; and that the said Betty Traies was about ten years older than herself.

The appellants objected that these facts were not any legal evidence, or not sufficient legal evidence, of a settlement of the said Betty Traies by birth in the parish of Crediton. They also objected that the order of adjudication was bad, upon two grounds: First, that the order for sending the lunatic to the county asylum of the county of Devon, and which was set out in the said order of adjudication, professed to be an order of two justices *of the peace of the city and county of the [*237 city of Exeter, sending the said lunatic to the county asylum of the county of Devon, and did not show any jurisdiction or power by which the said justices could send such lunatic to such asylum; and, secondly, that the order for sending the said lunatic to the said asylum was not for the sending of a pauper lunatic, but for the sending to the asylum of a lunatic not under proper charge and control; and that the order of adjudication ought to have shown when and at what time the said lunatic became a pauper, and chargeable to the said parish of St. David. The appellants also objected to the order of maintenance, on the ground that the order, pursuant to the provisions of stat. 16 & 17 Vict. c. 97, ought to have been made upon the guardians or overseers of the parish of Crediton, and not upon the clerk of the guardians.

The appellants also gave evidence, by the cross-examination of the respondents' witnesses, of a subsequent settlement by hiring and ser-

vice, acquired by the lunatic in the said parish of St. Thomas. The recorder of Exeter, who heard the appeal and stated the case, stated: "I thought such evidence insufficient to make out such settlement, and confirmed the order, subject to a case."

If the Court of Queen's Bench shall be of opinion that there was no evidence, upon the facts above stated, to warrant the conclusion that Betty Traies was settled by birth in the parish of Crediton, or if the Court shall be of opinion that either of the objections to the order of adjudication above stated is valid, then the order of adjudication and the order of maintenance are to be quashed. But, if the Court shall be of the contrary opinion, then both orders are to be confirmed, unless *238] the Court shall further be of opinion that the objection above stated to the order of maintenance is valid; in which case the order of maintenance is to be quashed.

Coleridge and *Phear*, in support of the order of sessions.—First, there was evidence from which the sessions might infer the birth of the lunatic's mother, Betty Traies, in Crediton. (On this point they were stopped by the Court.) Then it is objected that the orders of adjudication and maintenance do not show jurisdiction, because the order for sending the lunatic to the county asylum, which appears only by the recital in the orders of adjudication and maintenance, does not show jurisdiction upon which the justices so sending her could act; and, further, does not show at what time she became chargeable to St. David's. But, for the purpose of recital, enough appears. Sect. 97 gives the justices power to inquire into and adjudicate on the settlement of any pauper lunatic confined in a lunatic asylum in the county or borough of the justices, or sent to the asylum from such county or borough. The orders of adjudication and maintenance do show that the lunatic pauper was sent from the city and county of the city of Exeter, of which the persons making those orders are justices. The lunatic was sent to the asylum under the provisions of sect. 68, being at that time not a pauper nor wandering, but being not under proper care and control, and being a proper person to be taken charge of and detained; under which circumstances two justices have power to make the order for sending the person to the asylum. The circumstances appear by the orders of *239] adjudication and maintenance to have occurred; those *orders state the lunatic to have been "duly" sent. There is not a direct finding that she was lunatic; but that is not requisite for showing jurisdiction in the justices who find a person confined as a lunatic in an asylum. It is true that, under sect. 72, there are certain special circumstances under which a lunatic is not to be sent to the county asylum; but it cannot be necessary to negative these in the order by which the lunatic is sent; still less can it be necessary for the orders of adjudication and maintenance to recite so much of the removing order as may negative those circumstances. [Lord CAMPBELL, C. J.—No doubt an order of justices must show jurisdiction: but I never heard that it must show jurisdiction for the making of every order which it recites.] It does not seem to have been necessary here to recite the removing order at all. It is also objected that it does not appear from the orders of adjudication and maintenance how the lunatic is chargeable to St. David's. They do state that she is confined as a pauper lunatic, and sent from St. David's: under sect. 95 she would be chargeable to St.

David's till an adjudication of settlement or of the settlement not being ascertainable. That would result from the fact of the confinement. *Regina v. Minster*, 14 Q. B. 349 (E. C. L. R. vol. 68), is decisive for the respondent. In *Regina v. Rhyddlan*, 14 Q. B. 327, which was decided on the earlier statute of 8 & 9 Vict. c. 126, it was held that a justice might send to an asylum a lunatic not brought before him under the formalities there prescribed, the justice having jurisdiction however the lunatic was brought before him. Then it is objected to the order of maintenance that it ought not to have been made upon the clerk to the guardians. *But it is in effect made on the guardians: it is addressed to the Board of Guardians, and to their clerk, and to the parish officers of St. David's. The clerk is merely the organ of the guardians: and the order recites the facts showing the liability of the guardians, and recites also that the application was for an order on the clerk requiring him to pay.

Karslake and Bere, *contra*.—As to the evidence of the birth of Betty Traies, all that was proved was that her parents were married in the parish, and that she and her sister resided there at a time which could not well be less than fourteen or fifteen years after the birth of Betty Traies, and were both, as well as another sister, baptized there. Next, at the time when the lunatic is sent to the asylum she is not a pauper: and the enactments and proceedings as to pauper lunatics are entirely distinct from those as to lunatics not pauper: sects. 67, 68, Schedule (F.) No. 1. And there is nothing directly showing that the lunatic ever became pauper; nor, directly or indirectly, how, if at all, she became so, nor how a chargeability upon St. David's accrued. It is said to be enough, under sect. 97, if the justices find a pauper lunatic in the asylum. But the orders of adjudication and maintenance do not show even that. They only recite that she has been confined as "such pauper lunatic," referring, it seems, to the removing order, which states her not to be a pauper. In the case of a pauper not a lunatic, there is no power to adjudicate on the settlement or to make an order of maintenance: the proper proceeding is under sect. 94. [ERLE, J.—But if a lunatic is placed in an asylum, and has no property, he becomes *eo instanti* a pauper *lunatic.] If that were made to appear, no doubt the jurisdiction would arise. *Regina v. Rhyddlan*, 14 Q. B. 327 (E. C. L. R. vol. 68), was decided on the ground that the justice had jurisdiction upon any state of facts. It is true that, when an order of justices is made, it is not necessary to show jurisdiction in all antecedent proceedings: but the objection is, here, that the order itself fails to show jurisdiction in the matter to which it is addressed. Nor is the asylum shown to be that to which, by sect. 72, the pauper ought to have been sent. Then, it is true that the order of maintenance is addressed to the guardians: but the application is for an order, not on them, but on their clerk; and the order is so made. How could sect. 121 be put in force, which applies only when "the guardians upon whom any such order is made refuse or neglect?"

Lord CAMPBELL, C. J.—It appears to me that there was evidence of a birth settlement; and that none of the objections made are sustainable.

(WIGHTMAN, J., was absent.)

ERLE, J.—I think that there was here clear evidence of the birth

settlement. I think, also, that the other objections, although they might possibly have been effectually urged against the original order by which the lunatic was sent to the asylum, supposing it to be as recited in the subsequent orders, cannot be urged against such subsequent orders, inasmuch as it does not appear that the removing order, of which we know nothing except from the recital, may not have contained *242] enough to satisfy the statute. I think that, when an order, in itself apparently regular, refers by recital to a former order, we should, in absence of proof to the contrary, infer that the recited order was good, though, no doubt, this removing order, as recited, is exceedingly loose. I think, moreover, that there is a great deal in what Mr. Coleridge and Mr. Phear urged as to the jurisdiction to make the orders of adjudication and maintenance attaching by the fact of the lunatic being in the asylum. *Regina v. Minster*, 14 Q. B. 349 (E. C. L. R. vol. 68), supports that view. We cannot presume that this pauper was wrongfully in the asylum. Lastly, I think that the order, directed to the guardians and ordering their clerk to pay, was in substance an order on the guardians themselves.

CROMPTON, J.—I think that there was sufficient evidence of a birth settlement. I was not present during the argument; but I hope that my brother Erle's view as to the effect to be given to the recital is right. So far, however, as I am concerned, the question is still open.

Order of Sessions affirmed.

*243] *THOMAS BEARDSALL v. JAMES CHEETHAM.
SAME v. SAME. May 3.

Plaintiff, an attorney, delivered a bill for business done for defendant; and afterwards delivered another bill for other business done for defendant. Afterwards, at the expiration of a month from the delivery of the first bill, but before the expiration of a month from the delivery of the second, he proposed to defendant that the latter should waive the objection to the non-expiration of the month from the delivery of the second bill, and accept process in an action on the two. Defendant not having consented, plaintiff brought an action on the first bill, and afterwards, and after the expiration of the month from the delivery of the second bill, brought an action on that. Defendant afterwards obtained an order for taxing the two bills. The Master taxed less than one-sixth off the first bill; but he taxed off the second bill, more than a sixth of the aggregate of the two bills: and he allowed the plaintiff the costs of the first taxation, and the defendant the costs of the second taxation; making two separate allocaturs.

The Court (dissentiente Erle, J.), on the application of the defendant, ordered the Master to review his taxation of the costs of the taxations, and to include the whole in one allocatur; and that the two actions should be consolidated.

MANISTY, in this Term, obtained a rule calling on the plaintiff to show cause why the Master should not review his costs of the taxation of costs of four bills on which these two actions were brought, and give one allocatur in respect of the costs of taxing the four, instead of dividing the costs of taxation into two sets; and why the two actions should not be consolidated.

From the affidavits it appeared that the first action was upon three attorney's bills; and the second upon a fourth attorney's bill relating to different business. At the time of the commencement of the first action, the whole of the alleged business had been done. The plaintiff

had delivered the three bills, signed, a month before, namely 20th November, 1857: he had also delivered the fourth bill on 11th December, 1857, also signed; but a month had not occurred since such last-mentioned delivery before the commencement of the first action. Previously to the commencement of the first action the plaintiff proposed to the defendant to *accept service of one writ in respect of the whole [244 four bills, so as to save the expense of a second action, and to waive the objection to the month since the delivery of the fourth bill not having expired. The defendant not consenting, the plaintiff brought the first action on the three bills; and, after the expiration of a month from the delivery of the fourth bill, he brought the second action on that. After this, the defendant obtained an order for taxing the bills on which the first action was brought, and the bill on which the second action was brought; but it was not ordered that they should be taxed as one bill. Less than a sixth was taxed off the amount of the three bills: but there was taxed off the fourth bill more than a sixth of the aggregate of the four bills. The Master made two allocuturs: one on the three bills, in which he allowed plaintiff the costs of taxation; another on the fourth, in which he allowed defendant the costs of the taxation. The defendant had made various applications at Chambers; and ultimately Bramwell, B., referred the parties to the full court.

Skinner and Douglas Brown now showed cause.—The actions being separate, the allocuturs were properly separate. It is not the plaintiff's fault that there were separate actions; had the defendant consented to waive his right of insisting upon the expiration of a month after the delivery of the fourth bill, the whole would, as the plaintiff proposed, have been comprehended in one action. The plaintiff was not bound to send in all his bills at once. As to the consolidation of the two actions, the cases are conflicting. They are collected in Chitty's Archbold's Practice, vol. II., part v., ch. 8 (p. 1274, 9th ed., by Prentice).

**Manisty*, contra.—The plaintiff might have waited till the expiration of the month, and then have brought a single action [245 for the whole: or he might have delivered the fourth bill at the same time with the other three.

Lord CAMPBELL, C. J.—On the whole, I think the rule should be made absolute.

WIGHTMAN, J.—I am of the same opinion. The bills ought to have been delivered together.

ERLE, J.—I am sorry that this rule is to be made absolute. The defendant might have prevented any difficulty from arising, if he had not chosen to stand on his legal right and insist on the full month.

CROMPTON, J.—I agree that this rule ought to be made absolute. The four bills are substantially one.

“Ordered: That it be referred back to,” &c., “one of the Masters of this Court, to review his taxation of the costs of taxing the plaintiff's four bills of costs, and amend his allocatur by giving one allocatur in respect of the costs of taxing the four bills, instead of dividing the costs of taxation into two sets. And that the two actions brought by the above-named Thomas Beardsall against the said James Cheetham be consolidated. That the second action only be proceeded with, and the plaintiff's claim in the first-mentioned action be included in the said

second-mentioned action: the defendant hereby undertaking to take no objection by reason of such consolidation."

*246] *IN THE EXCHEQUER CHAMBER.

JOHN WHEELTON, LYS SEAGAR, and CHARLES LANE, Appellants, v. EDWARD BRYDGES HARDISTY, JACOB BELL, and WALTER BARKER, Respondents. *May 5.*

THIS case is reported, 8 E. & B. 285 (E. C. L. R. vol. 92).

The QUEEN v. The Churchwardens and Overseers of the Poor of HURSTBOURNE TARRANT. *May 6.*

A charge was made on the poor-rates of a parish for the expenses of a survey and valuation of the parish made under stat. 6 & 7 W. 4, c. 96, s. 3. In the bond creating the charge were inserted provisions for paying off not less than one-fifth of the sum charged, with interest, in each succeeding year, till the whole was repaid. More than five years having elapsed since the making of the bond, and the whole sum not having been discharged, the bondholder obtained a rule *Nisi* for a mandamus to the officers of the parish to pay the amount remaining due upon the bond.

On the affidavits it appeared that negotiations between the bondholder and the parish officers had been pending during the interval between default and the application to this Court.

Held, that the charge under stat. 6 & 7 W. 4, c. 96, s. 3, was a charge on the rates generally, and might be enforced against the rates in years subsequent to the five years next after the making of the charge.

Held, also, that the applicant was bound to come promptly to the court, or to explain his delay; but (dubitante Crompton, J.), that in the present case the delay was sufficiently explained.

MONTAGUE SMITH, in this Term, had, on behalf of Mr. Heath, obtained a rule calling on the churchwardens and overseers of Hurstbourne Tarrant to show cause why a mandamus should not issue, *247] *commanding them to pay to William Hawkins Heath the amount remaining due to him, of a sum secured to him by a charge made on the poor-rates of the parish, by the Guardians of the Andover Union, by a bond of 13th June, 1840.

From the affidavits on which the rule was obtained, it appeared that in 1839 the Poor Law Commissioners, under the provisions of stat. 6 & 7 W. 4, c. 96, s. 3, ordered that a survey, with a map and valuation, of the parish of Hurstbourne Tarrant should be made; and directed the Guardians of the Andover Union, which comprises that parish, to make provision for paying the costs thereof, either by a separate rate or by a charge on the poor-rates, as they the Guardians might see fit. The survey was made; and the costs amounted to 298*l.* Mr. Heath, in 1840, advanced the money, at 5 per cent. interest, on the security of a bond, under the seal of the Guardians, making it a charge on the poor-rates; this bond contained a provision, in pursuance of sect. 3 of stat. 5 & 6 W. 4, c. 96, that not less than one-fifth of the sum should be payable in each succeeding year till the whole was paid off. He received payment

of interest up to 1844, and part of the principal; and in 1844 the sum remaining due was 223*l.* 10*s.* On March 1, 1845, he received a further payment of 111*l.* 15*s.*; but he had received no payment of principal or interest since that date. On the 7th August, 1845, Mr. Heath's solicitor wrote to the overseers of Hurstbourne Tarrant requiring further payment. He stated in his affidavit that, "since the above application, I had various interviews with, and caused several letters to be written to, the different parish officers for the time being of the said parish, several of whom have from time to time promised to use their *endeavours [*248 to obtain the necessary funds for that purpose. And I say that, relying on the good faith of such parish officers and the rate-payers of the said parish, I have hitherto abstained from commencing proceedings at law for the recovery of the said money." On the 16th April, 1857, he wrote a peremptory letter demanding payment: and all delay in making application to this Court subsequent to that day appeared to be at the request of the Board of Guardians, who wished the Poor Law Commissioners to be consulted. The only explanation of the delay, between the 1st March, 1845, and 16th April, 1857, was that contained in the passage in the affidavit above cited. No affidavits were made on the other side.

Lush and *Prentice* showed cause.—Stat. 6 & 7 W. 4, c. 96, s. 3, requires that payment of these costs shall be provided for by the guardians, "either by a separate rate or by a charge on the poor-rates, as they may see fit; but in case of such charge being made, then provisions shall be made for paying off not less than one-fifth of the sum charged on the rates, and such interest as may from time to time be payable in respect of such charge or any part thereof, in each succeeding year, till the whole is repaid." The charge ought therefore to have been entirely defrayed by the rate-payers from 1840 to 1845. The present rule seeks to cast the charge on the present rate-payers, who are by no means the same persons as the rate-payers of 1840 and the immediately succeeding years. There has not hitherto been any decision on the construction of this statute. *Rex v. Carpenter*, 6 A. & E. 794 (E. C. L. R. vol. 33), turned *on stat. 22 G. 3, c. 83, s. [*249 29, which in express terms enacts that the charge "shall continue upon the said rates until the money so borrowed" shall be paid. *Regina v. St. Michael's, Southampton*, 6 E. & B. 807 (E. C. L. R. vol. 88), turned on stat. 58 G. 3, c. 45, s. 59, which, as pointed out in the judgment, does not in any way make the obligee a party to the direction to pay off the instalments; but the present Act is different. [The Court intimated that the question as to the construction of the Act should be put upon the record by the writ going: but the counsel on both sides prayed the Court, with a view to spare expense, to decide the point, and agreed to be finally bound by the decision on the rule. The Court having assented to this, the argument proceeded.] The true construction of this Act is, that the charge is to be by instalments payable out of the rates of these specific five years. [Lord CAMPBELL, C. J.—If that be so, what remedy would the creditor have in case the last instalment was not paid in the fifth year? You may suppose the rates of that year all raised and applied to other purposes?] It may be that there is no remedy. [WIGHTMAN, J.—The section authorizes a charge generally on the rates; then follows a direction that a provision shall be made for

paying off the charge. But is that more than directory on the parish officers?] The Guardians act under a statutable power, and have no authority to make the charge in any other way. But, even supposing that the creditor might have had a remedy if he came promptly for a mandamus, he is barred by delay. The charge on the rates ought to have been borne by the rate-payers for the time being: and the Court *250] in its discretion will not grant a mandamus to aid a party who has negligently suffered a large part of them to be changed: *Rex v. The Justices of Lancashire*, 12 East 366. There is no sufficient excuse given for the inaction of the creditor between March 1845, when the last payment was made, and the year 1857, when he first began to take active steps to enforce payment.

Montague Smith, in support of the rule.—The charge is by the Act imposed generally on the rates; then follows a proviso directing the officers to pay it off by instalments: but the charge is not extinguished by the laches of the parish officers. That is the principle to be deduced from *Rex v. Carpenter*, 6 A. & E. 794 (E. C. L. R. vol. 33), and *Regina v. St. Michael's, Southampton*, 6 E. & B. 807 (E. C. L. R. vol. 88). If there had been improper delay on the part of the applicant, it might be a bar. But the delay occurred, it appears, in consequence of negotiations; and, though these are not set out in detail, no statement showing that the delay was improper is made on the other side.

Lord CAMPBELL, C. J.—On the whole, I think that this application should be granted. For by the enactment in question the Guardians had a right to provide for the payment of the costs, either by a separate rate or by a charge on the poor-rates; in the latter case there is a direction that provisions shall be made for paying off the charge in five years; but still the Guardians have a right to charge it on the rates generally. Here they do charge it on the rates, and make provisions such that the parish officers ought to have paid it off in five years. *251] The officers did not do so: but I cannot say that the right to recover payment out of the rates is therefore gone. Nevertheless, the application to this Court ought to be made within a reasonable time; and here the onus lies on the bondholder to show that he has not in this delay been guilty of negligence. Now certainly he might have been more urgent in his applications for payment; but he does not lie by altogether. It appears he did apply, and got promises from the parishioners, which induced him to take no further steps. If there had been negligence on the part of the bondholder, the Court, in the exercise of its discretion, would refuse to interfere: the reason of my judgment is that I think the legal remedy remains after five years; and that here there has not been such negligence made out as to disentitle the applicant.

WIGHTMAN, J.—The Act says that provisions shall be made for paying off not less than one-fifth of the money charged in each succeeding year; but it does not limit the payment to one-fifth out of the rates in each of these years. The whole may be paid in any one year; and, if it is not paid off in five years, the creditor may apply for a mandamus. But the difficulty in this case arises from the lapse of time which, if not accounted for, would be fatal. But it seems that, though no application to this Court was made promptly, yet there were applications to the

parish; and I think it would be very hard upon the creditor if he were to lose his money under these circumstances.

ERLE, J.—The Guardians borrowing this money had power to charge it on the rates; and the provisions *following are not obligatory, [*252 but directory. I come to this conclusion with some reluctance; for I think the rate-payers in 1840 and the succeeding years were the parties who ought to have defrayed these charges. Here, however, there is evidence that the bondholder was diligent in pressing for his money; and I do not object to the conclusion to which the Court have come, that the delay has not in this case been negligent. It would, I think, be highly satisfactory if it were in all such cases made obligatory on the creditor to proceed to enforce payment at once. If the Act had said that the charge should be paid off in five years, and not otherwise, it would have made it the duty of the creditor to secure payment in time.

CROMPTON, J.—There are two questions. First, whether, under this Act, there is a general charge on the rates, or only a charge on the rates for five years. On this I think it clear that, whether it would be expedient to impose on the bondholder such a duty as my brother Erle suggests or not, no such duty is by this Act imposed on him. But still, secondly, if there has been a lapse of time and want of diligence on the part of the creditor, the Court, in the exercise of its discretion, ought not to interfere; and upon this part of the case I have had some doubts whether the delay was sufficiently excused.

The Court, in consequence of the consent given, ordered that the writ should issue peremptory in the first instance.

*The QUEEN v. The Recorder of RICHMOND. *May 6.* [*253

There having been no fixed rule of practice as to the time within which an application for a mandamus to the Sessions to enter continuances and hear an appeal must be made, this Court ordered that in future such applications must be made not later than in the Term following the Sessions at which the refusal was made, unless special circumstances appear by affidavit to account for the delay to the satisfaction of the Court.

If notice of chargeability and statement of grounds of removal be put into the post on one day and received by parish officers on the next, the latter is the day on which they are "sent;" and it is sufficient, within stat. 11 & 12 Vict. c. 31, s. 9, if the application for the depositions be received by the clerk to the justices on the twenty-first day thereafter, reckoning one day inclusively and another exclusively.

T. C. FOSTER, on a previous day in this Term (26th April), obtained a rule *Nisi* for a mandamus commanding the Recorder of Richmond to enter continuances, and hear an appeal by the overseers of the poor of the township of Knaresborough against an order removing William Watson and his wife and child from the parish of Richmond to the township of Knaresborough.

From the affidavits it appeared that the order of removal, notice of chargeability, and statements of grounds of removal were put in the post-office by the overseers of Richmond on the 28th September, 1857, and were received by the overseers of Knaresborough on the 29th September. On the 19th October the overseers of Knaresborough put into the post-office a demand of a copy of the depositions. This was

received by the clerk of the justices on the 20th October. The depositions were received by the overseers of Knaresborough on the 21st October; and notice of appeal given on the 28th October. At the Sessions holden on 8th January, 1858, the Recorder, without hearing the merits, confirmed the order of removal on the ground that a copy of the depositions was not applied for in time, under stat. 11 & 12 Vict. c. 31, s. 9.

The affidavit stated, as an excuse for not having moved for the rule *254] in Hilary Term, that it had not been found *practicable to convene a meeting of the rate-payers so as to consult them between the 8th January and the end of that Term.

A. W. Simpson now took a preliminary objection.—The rule has not been applied for till Easter Term, though the decision of the Recorder had been pronounced so as to leave sufficient time for making the application in Hilary Term. The excuse made, that a meeting of the rate-payers could not be assembled, is not sufficient. There was no need to have such a meeting. The general rule of practice is that the application must be made "in the Term following the Sessions at which the refusal was made, unless under special circumstances, which should be stated in the affidavits, to account for the delay; there is no absolute rule on the subject, but in every case of application for a mandamus, any considerable delay in making the application after the refusal to do the act required, should be properly accounted for:" *Corner's Practice* on the Crown Side 219.

T. C. Foster, contra.—No delay has in fact been occasioned; for, if the rule had been obtained in Hilary Term, it must have been so late that cause could not have been shown within that Term. There is no fixed rule of practice; the only rule is that the application must be made promptly. In *Regina v. The Justices of the West Riding*, 2 Q. B. 505, 506, n. (E. C. L. R. vol. 42), this Court held that taking time for the purpose of obtaining the sanction of the township, and consulting counsel, was a sufficient excuse for delay.

*255] *Lord CAMPBELL, C. J.—The majority of the Court are of opinion that in this case the applicant should be heard; but it is desirable that there should be a definite rule. In future, therefore, application must be made within the Term after the decision of Sessions. This we pronounce as a rule of practice which will in future be adhered to.

Counsel were then heard upon the merits.

T. C. Foster cited *Regina v. Slawstone*, 18 Q. B. 388 (E. C. L. R. vol. 83).

Per CURIAM.—We adhere to the decision in *Regina v. Slawstone*, which is strictly in point. Rule absolute.

The following memorandum was made in the Rule book, of this date.

REGULA GENERALIS.

It is ordered, that for the future any application to this Court for a writ of mandamus to justices to enter continuances and hear an appeal shall be made not later than in the Term following the Sessions at which

the refusal was made, unless special circumstances appear by affidavit to account for the delay to the satisfaction of the Court.

By the Court.

*The QUEEN v. The Justices of KINGSTON UPON THAMES and EDWARD PHILIPS. *May 7.* [*256]

A poor-rate, good on the face of it, had not been appealed against. On an application before justices to issue a distress warrant to enforce payment of the rate, it was made to appear that there were substantial grounds for contending that the rate was retrospective, and therefore bad. The justices refused to issue their warrant. On an application to this Court for a rule to command them to issue the warrant:

Held, that the justices were not justified in inquiring whether there was a ground of appeal against the rate, and refusing their warrant on that ground. And this Court made the rule absolute.

TOMLINSON, in this Term, obtained a rule calling upon four justices of Kingston upon Thames and Edward Philips to show cause why the justices should not issue their distress warrant against Philips to levy the amount of a rate for the relief of the poor of the parish of Kingston upon Thames made in October, 1857.

From the affidavits on both sides, it appeared that in the parish of Kingston upon Thames a rate of 1s. 6d. in the pound produces the sum necessary for the ordinary expenses of the parish, and is the usual rate. In January, 1857, a rate was made at 1s. 6d. in the pound, which was quashed upon appeal in May, 1857. The overseers, however, collected the January rate, informing the rate-payers that credit would be given to them for the amount so paid in a succeeding rate. In June, 1857, another rate was made at the rate of 1s. 6d. in the pound. It being found that, if, in levying this rate, credit was given for the payments of the January rate, the sum levied would not meet the current expenses of the parish, this rate was paid in full, on an understanding between the rate-payers generally and the overseers that the next rate should be made for a larger sum, and that, in collecting it, credit should be given for the payments of the January rate. A rate was made in October, 1857, at the rate of 3s. in the pound, with the intention to allow credit according to this understanding: but, when *that rate came to [*257 be collected, the overseers were apprehensive that, if they allowed such credit without judicial sanction, they might be surcharged. They therefore applied to the justices of Kingston upon Thames for a distress warrant against one of the rate-payers, who had been rated to, and had paid, both the January and the June rates, to levy the whole of the October rate without giving any credit. The justices declined to issue their distress warrant for this purpose; and this Court, in Hilary Term, (a) refused a rule Nisi to compel them so to do. After this, the overseers collected the October rate, allowing credit to all the rate-payers who had actually paid the January rate. Such being the position of affairs in the parish, the following were the special facts which gave rise to this application.

(a) January 11th, 1858. On this motion it was not brought to the notice of the Court that the rate from which the deduction was claimed was not the effective rate on the parish, next after the January rate was paid. The Court acted under a mistaken impression as to the facts, without deciding any point as to the effect of this in law.

Edward Philips was the owner of a tenement which was unoccupied at the time when the January rate was made; and no one was assessed to that rate, nor was any payment of that rate made, in respect of this tenement. He was himself assessed as occupier in the June rate, and paid it in full. He was assessed to the October rate at 3s., and offered to pay half that rate: but he contended that he was entitled to credit for the amount which would have been paid in respect of the January rate if any one had been rated to it in respect of his tenement. The justices, on application being made to them for a distress warrant, refused to grant it.

*258] *Sumner* now showed cause.—The rate made in October for the purpose of levying the money which ought to have been levied in June is retrospective. It will be said that this is matter of appeal: but this Court refused to enforce a bad rate, even after an appeal had been dismissed: *Rex v. Newcomb*, 4 T. R. 368. [CROMPTON, J.—That was because, by the terms of the Act (17 G. 2, c. 3, s. 1), “no rate shall be esteemed or reputed valid and sufficient so as to collect and raise the same,” unless due notice shall have been given; which was not there done.] At all events, the Court in its discretion will not enforce this rate: *Regina v. Parker*, 7 E. & B. 155 (E. C. L. R. vol. 90). [ERLE, J.—There, a clear, definite case of injustice was shown. Lord CAMPBELL, C. J.—Do you say that the justices are not to be compelled to issue their warrant in any case in which the rate may be quashed on appeal?] The argument goes so far.

Tomlinson was not called upon to support his rule.

Lord CAMPBELL, C. J.—We give no opinion as to whether the rate is good or bad on appeal: but we are all clearly of opinion that the ground of defence is untenable. There being no appeal, and the rate being good on the face of it, it would be most injurious if it were to be supposed that justices are justified in refusing to issue the warrant because there is some ground on which there might have been an appeal.

WIGHTMAN, ERLE, and CROMPTON, Js., concurred.

Rule absolute.(a)

(a) See the next case.

*259] *The QUEEN v. The Justices of KINGSTON UPON THAMES and RICHARD WEDD. May 7.

A poor-rate was made in January, quashed on appeal, but was levied, under stat. 41 G. 3. c. 23, the amount to be taken as payment on account of the next effective rate on the parish. The next effective rate was made in June; but, the parish being in want of money, it was arranged between the rate-payers generally and the overseers that the June rate should be levied in full, the payments of the quashed rate being to be allowed in the collection of the next rate. A rate being subsequently made in October, the overseers, being apprehensive that they might be surcharged if they carried out this arrangement, applied for a distress warrant to levy the October rate in full against the occupant of a house, whose predecessor had paid the quashed rate. The justices refused to issue their warrant. On a rule to order them so to do:

Held, by the whole Court, that the payment of the quashed rate was to be taken as payment on account of the next effective rate, which in this case was that made in June, and could not be taken as payment.

Held by Lord Campbell, C. J., and Wightman, J., that the rule ought to be made absolute. But held by Erle and Crompton, Js., that to enforce the payment in full, in frustration of the arrangement, would be unjust; and that this Court, in its discretion, ought not to enforce such injustice.

The Court being equally divided, the rule dropped.

TOMLINSON had obtained a rule calling upon four justices of Kingston upon Thames and Richard Wedd to show cause why they should not issue their distress warrant against Wedd to levy the amount of a rate for the relief of the poor of Kingston upon Thames made in October, 1857.

The affidavits disclosed the same facts, as to the making of the different rates in this parish, as are stated in the preceding case.^(a) The special facts giving rise to this application were as follows. Wedd became occupant of a house in September, 1857, and was assessed in respect of it to the October rate. He claimed credit for the amount of the February rate, which had been paid by the then occupant of his house, who was assessed in that rate. In June the house was vacant; and no one was assessed in respect of it in the rate then made. The *justices had been applied to for their warrant to levy the full [*260 amount of the October rate, and had refused to do so.

Sumner now showed cause.—The rate in January having been levied, though quashed, the payments are, by stat. 41 G. 3, c. 23, s. 1, to be taken as “payments on account of the next effective rate” “which shall be made for the relief of the poor of the same parish.” [Lord CAMPBELL, C. J.—The occupant in this case is no longer the same person. The house is not liable to the rate.] No; but the rate has been paid. [CROMPTON, J.—The Act does not say a payment on account of the next rate in respect of the sum assessed on the person who has paid. It would seem to mean a payment on account of the sum assessed in that next rate in respect of the same premises.] Then there was no rate on this house till October. That was the next effective rate on this house. [CROMPTON, J.—It is, by the statute, a payment on account of the next effective rate for the relief of the poor of the same *parish*. That was in June. The object of the Legislature may well have been to prevent the settlement of the matter hanging over.] At all events, the Court will not order a warrant to issue where it would work injustice. If the allowance had been made in June, Wedd would have been rated at 1s. 6d. in the pound only. He is rated at 3s. in consequence of an agreement to substitute the October rate for the June rate; and it is unjust not to allow him the benefit of that agreement, as he suffers its burthen.

Tomlinson, in support of the rule.—The officers of the poor acknowledge that there was an understanding *equivalent to an agreement that the October rate should be in the place of the June [*261 rate, and as individuals they think that it would be fair to allow the deduction claimed, and wish to do if it can be done: but they are advised that they cannot do so, as the June rate was the next effective rate, and they have no power to make an allowance against any other rate.

Lord CAMPBELL, C. J.—I am of opinion that the rule ought to be absolute. The rate in this case was good on the face of it; and there

(a) *Ante*, p. 256.

was no appeal against it. It ought to be collected, except in so far as any abatement is ordered by the Legislature. Stat. 41 G. 3, c. 23 does in certain circumstances make an abatement. The amount of the quashed rate is to be taken as payment on account of the "next effective rate" made in the parish. But here there was an effective rate on the parish made in June. That was the rate on account of which the payment was made; and there is no authority to make any abatement in collecting a subsequent rate. Nor do I see that this will be any hardship on Mr. Wedd, who did not himself pay the former rate.

WIGHTMAN, J.—I am of the same opinion. The statute authorizes a deduction from the next effective rate. In this case, if the former occupant had not quitted the house, he would have been entitled to a deduction from the June rate. But the house was then vacant; the defendant did not come in till September; and he claims to treat the payment as on account of the October rate: that was not the *next* effective rate, so that he is not within the terms of the only Act upon the subject. I therefore think that the rule should be absolute.

*262] *ERLE, J.—I regret that I cannot concur in the reasons of my Lord and my Brother Wightman for thinking that this rule should be made absolute. As between man and man, it seems to me clear that the person who is resisting this payment is entitled to the abatement which he claims; and it is clear that the parties making the rate considered that he was so entitled. The rate made in January having been quashed, those who had paid it might deduct the sums paid from the next effective rate on the same parish. That is equivalent to a right that those premises should have a credit for the rate paid as between them and the premises that had not paid. For the convenience of the parish an agreement was come to that no deduction should be made from the June rate, the whole amount to be raised by that rate being required for current expenses, and that those persons who were entitled to claim an abatement on account of their payments of the quashed January rate should be allowed to deduct the sums paid from the October rate. Accordingly, in October a double rate was made at 3s. in the pound, being 1s. 6d. for the current expenses and 1s. 6d. for the quashed rate; in this sense, that the persons that had paid that rate should be exempt therefrom, and that those who had not should be liable thereto. The January rate had been paid in respect of these premises by the former occupier; and, if the present occupier was compelled to pay the double rate in October, his premises would be overrated at double the amount as between him and the other occupiers who had paid the January rate. I think therefore that the October rate became the next effective rate for the purpose of this allowance, and that the occupier of the premises was entitled to claim exemption from the liability to pay that sum *which might have been deducted from

*263] the former rate. Looking at the understanding come to by all parties, I cannot concur in the opinion that the parish officers were bound to levy upon Wedd for the double rate at which he was indeed nominally assessed, but only for the purpose above explained.

CROMPTON, J.—I was a party to the judgment in *Regina v. Parker*, 7 E. & B. 155 (E. C. L. R. vol. 90); in which case we acted, as I understood, on the principle that, when we saw that an allowance in fairness and justice ought to be made, we would not, in the exercise of our dis-

cretion, interfere to prevent the parish officers from making it. And I apprehend that we were warranted in so doing; for the mandamus is a high prerogative writ, which it is not obligatory on us to grant for the purpose of working injustice. The facts in the present case seem to me to make, if anything, a stronger case of injustice than those in *Regina v. Parker*; and, without positively saying that I think the ground of our decision in that case was right, I think I must consider it to be law: and, if so, we ought not to compel the levying of this rate.

The Court being equally divided, the rule drooped.

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***The QUEEN v. The SUDBURY Burial Board. May 7. [*264**

Stat. 15 & 16 Vict. c. 85, authorizing the formation of a Burial Board in a "parish," is applicable to a parish not having separate overseers, nor separately maintaining its poor. Sect. 52, the interpretation clause, extends the meaning of the word to places, not parishes, having separate overseers and separately maintaining their own poor, but does not exclude parishes which, for any reason, do not fulfil those conditions.

HUGH HILL had in this Term obtained a rule Nisi for a mandamus to the Burial Board of the parishes of Saint Peter, Saint Gregory, All Saints, and Ballingdon cum Brandon, in the borough of Sudbury, commanding them to do all such things as are lawful and necessary to raise the required amount due for the purchase-money of the new burial-ground, and to pay the same to Mrs. Frances Gooday. The affidavits on both sides disclosed that Mrs. Frances Gooday was the executrix of a person who had sold to the Burial Board the site of a new burial-ground of which the Board had taken possession. The executrix had obtained judgment by default against the Burial Board for the price, and had issued execution, but obtained only part of the judgment-debt; and she had required the Burial Board to take the proper steps for raising the residue out of the poor-rates. On the rule coming on, Lord Campbell, C. J., intimated that in such a matter it was fit that the writ should go in order that the question might be on the record: but, the counsel on both sides having stated that a third person had been willing to lend the money on the security of the rates but for an objection taken by his counsel to the authority of the Burial Board to charge them, and probably would do so if the opinion of this Court was that the objection was unfounded, which would obviate the necessity of further litigation, and that this was the *only point intended to be discussed on the rule, the Court consented to hear and give their [*265 opinion on that point.

The facts raising this question appeared on the affidavits to be as follows.

The town of Sudbury consists of three ancient ecclesiastical parishes, Saint Peter, Saint Gregory, and All Saints, each having a separate church, churchyard, and churchwardens. By 1 stat. 1 Ann. c. 34,(a) a corporation was created for the management of the poor of the town of Sudbury, consisting of the three parishes; and, since that Act, one poor-rate on the three parishes is made for defraying the expenses of

(a) Private. "For erecting hospitals and workhouses within the town of Sudbury in the county of Suffolk, for the better employin g and maintaining the poor thereof."

the management of the poor of all three indiscriminately. The hamlet of Ballingdon cum Brandon has separate churchwardens and a separate vestry, and maintains its own poor separately; but the inhabitants attend the church of the parish of All Saints; and their dead were interred in the churchyard of that parish. In 1854 the churchyards in the three parishes were closed; and a joint Burial Board for the three parishes and the hamlet was constituted. For the purposes of the discussion, it was assumed that everything was regular if there was, at that time, power to constitute a board for districts situated as the three parishes and the hamlet were.

Montague Smith now showed cause.—Stat. 16 & 17 Vict. c. 134, s. 7, extends the provisions of stat. 15 & 16 Vict. c. 85, to parishes not in the Metropolis. It is under the provisions of that Act, if at all, that *266] this Burial Board is constituted. Stat. 15 & 16 Vict. c. 85, s. 10, authorizes the forming of a Burial Board on the requisition of the rate-payers “of any parish.” That is the first step which is requisite. Now sect. 52 enacts that “‘parish’ shall mean every place having separate overseers of the poor, and separately maintaining its own poor.” The three parishes within the town of Sudbury do not separately maintain their own poor, and have not separate overseers. They are therefore not parishes within that Act. Stat. 18 & 19 Vict. c. 128, s. 11, enables such places as these to form Burial Boards, but is not retrospective.

Hugh Hill, contra.—If the language used in sect. 52 had been such as to show that the Legislature intended to exclude all parishes that, for any reason, had not separate overseers, the objection might be good. But the language used is in effect the same as if the Legislature had said the word parish shall mean what it does, and also shall include every place having separate overseers and separately maintaining its own poor. The section begins as is usual by saying that the words shall bear the meaning assigned “unless there be something in the subject or context repugnant to such construction.” The limited meaning proposed by the other side would exclude many parishes which the Legislature intended to include.

Lord CAMPBELL, C. J.—I think that the construction proposed to be given to the word parish, so as to make it exclude such parishes as these, would be directly repugnant to the whole object of the Act, and would in many cases defeat the object of the Legislature. I think clearly that *267] the interpretation clause extends the meaning of the word so as to include such places though not parishes, but does not exclude parishes.

WIGHTMAN, J.—I am of the same opinion. The construction proposed is repugnant to the whole context.

(No other judge was present.)

Rule absolute.

RICHARD NICHOLSON *v.* CHARLES ARTHUR HILL
HEATON ELLIS. *May 8.*

Stat 7 & 8 Vict. c. 71, after abolishing the sessions for the City and Liberty of Westminster, and directing that the county sessions for Middlesex shall be holden by adjournment within the City and Liberty, enacts, by sect. 12, that the persons holding the several offices of high bailiff of Westminster, clerk of the peace, and all other officers of the court of sessions of the peace for the said City and Liberty, shall, so long as they shall be entitled to hold their several offices, execute the duties and be entitled to the emoluments, within the said City and Liberty, of the several offices of sheriff, clerk of the peace, and other corresponding officers of the county of Middlesex.

Held, that this extends only to the persons holding the offices in the City and Liberty at the time of the act passing. By the Court of Exchequer Chamber, the Court of Q. B. having been equally divided.

ACTION for money had and received. By consent of parties, and order of Coleridge, J., the following case was stated, without pleadings, under sect. 46 of The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

The plaintiff is clerk of the peace for the City and Liberty of Westminster. The defendant is clerk of the peace for the county of Middlesex, within which county the City and Liberty of Westminster is locally situate.

Separate commissions of the peace have always been issued for the county and for the City.

On 6th August, 1844, stat. 7 & 8 Vict. c. 71, "For the better administration of criminal justice in Middlesex," was passed; under which an Assistant Judge was appointed for the Middlesex Sessions.

*And by the 11th and 12th sections it was enacted as follows.

"11. And whereas by an Act passed in the ninth year of the reign of King George the Fourth, (a) intituled 'An Act to enable the justices of the peace for Westminster to hold their sessions of the peace during Term and the sitting of the Court of King's Bench,' the sessions of the peace for the said City and Liberty are limited to the weeks preceding the holding of each of the quarter or general sessions of the peace for the said county of Middlesex: and whereas by ancient usage and of right the justices of the peace for Middlesex have constantly holden and may hold their sessions of the peace for the said county within the said City and Liberty, and the holding of sessions for the City and Liberty has become unnecessary; Be it enacted, that after the sessions of the peace which shall be holden in and for the said City and Liberty next after the passing of this Act sessions of the peace in and for the said City and Liberty shall cease to be holden, and the sessions to be holden in and for the said county of Middlesex shall be holden by adjournment within the said City and Liberty, and shall have full jurisdiction over all things cognisable by the sessions for the said City and Liberty; and that the inhabitants of the said City and Liberty shall not be exempted from serving on juries at the sessions of the peace for the county of Middlesex holden within the said City and Liberty."

"12. And be it enacted, that the persons holding the several offices of high bailiff of Westminster, clerk of the peace, and all other officers of the court of sessions of the peace for the said City and Liberty, shall, so long as they shall be entitled to hold their

(a) Stat. 9 G. 4, c. 9.

several offices, execute the duties and be entitled to the emoluments within the said City and Liberty of the several offices of sheriff, clerk of the peace, and other corresponding officers of the county of Middlesex: provided always, that the records of every session of the peace for the said county holden within the said City and Liberty shall be sent, within fourteen days after such session, by the clerk of the peace of the said City and Liberty, to the clerk of the peace of the said county, and shall be kept by him with the other records of his office."

Up to the time of the passing of the said Act, and for many years previously, four general quarter sessions and eight general sessions of the peace for the county had been usually held in each year at the Sessions House, Clerkenwell, with an adjournment once every year, or oftener, into Westminster: and four quarter sessions of the peace for the City and Liberty of Westminster had been held in each year at the Guildhall, Westminster.

The jurisdiction of the quarter sessions for the City and Liberty was confined to matters arising within the City and Liberty; but the jurisdiction of Middlesex sessions extended, and still extends, over the whole county, including the City and Liberty of Westminster, and to matters arising within the said City and Liberty, though, in practice, such matters were (before the passing of the said Act) usually dealt with and disposed of at the sessions for the said City and Liberty.

Since the passing of the said Act, the sessions of the peace in and for the said City and Liberty have (with exception of one session) ceased to be holden.

*270] *The sessions for the county have, since the passing of the said Act, been holden by adjournment (as directed by the Act) within the City and Liberty: and, according to the arrangement now existing, eight general and four quarter sessions for the county are held every year at the Sessions House, Clerkenwell; and each of such sessions is adjourned to and held at the Guildhall, Westminster, within the said City and Liberty. At these sessions for the county cases are heard and determined arising as well within the limits of the City and Liberty as in other parts of the county without those limits; and fees and emoluments arise in respect of each of such classes of business.

The late clerk of the peace for Westminster, who held the office at the time of the passing of the said Act, and had, previously to the passing thereof, performed the duties of clerk of the peace at the sessions held in and for the city of Westminster, acted, after the passing of the said Act, as clerk of the peace at the adjourned sessions for the county held at Westminster, until his resignation as hereinafter mentioned, and received annually, in lieu of the emoluments, a fixed sum agreed on between him and the clerk of the peace for the county. On 12th October, 1857, he resigned his office: and, on the following day, the plaintiff was duly appointed clerk of the peace for Westminster, and in virtue of such appointment, has claimed and claims to execute the duties, and to be entitled to the emoluments, of clerk of the peace within the said City and Liberty; which claim has been and is opposed by the clerk of the peace for Middlesex.

*271] There are duties belonging to the office of clerk of *the peace for Westminster other than any which he may have in respect of business done at general or quarter sessions.

The Court shall have power to draw inferences of fact if necessary.

The questions for the opinion of the Court are :

First, does the 12th section of the said act extend to the plaintiff, or apply only to the person holding the office of clerk of the peace for Westminster at the time of the passing of the act? Secondly, if the first question should be determined in favour of the plaintiff, is the right of the plaintiff to the emoluments of clerk of the peace therein mentioned limited to those arising from cases which might have been heard and determined at the sessions held in and for the city and liberty of Westminster, if the said act had not been passed? Or, thirdly, does it extend to all business actually transacted at the adjourned county sessions holden within the said city and liberty?

If the Court shall be of opinion that the first and third questions ought to be answered in favour of the plaintiff, judgment is to be entered for the plaintiff for 10*l.* and costs. If the Court shall be of opinion that the first and second questions are to be answered in favour of the plaintiff, judgment is to be entered for the plaintiff for 5*l.* with costs. If the opinion of the Court is, that the first question shall not be answered in the plaintiff's favour, judgment is to be entered for the defendant with costs.

The case was argued in last Hilary Term,(a) by Sir *F. Kelly*, for the plaintiff, and Sir *F. Thesiger* for the *defendant. The course of argument will sufficiently appear by the judgments of the [*272 learned Judges in this Court, and the argument and judgment on appeal in the Exchequer Chamber.

Cur. adv. vult.

On this day the learned Judges, being divided in opinion, delivered judgment seriatim.

CROMPTON, J.—The question in this case was whether the plaintiff, as clerk of the peace for the city and liberty of Westminster, was entitled to certain fees and emoluments of the clerk of the peace of the county of Middlesex, arising within the city and liberty. This depended entirely on the 11th and 12th clauses of stat. 7 & 8 Vict. c. 71, "For the better administration of criminal justice in Middlesex." The justices for the city and liberty had been accustomed to hold sessions for the city and liberty; the times for holding which were regulated by stat. 9 G. 4, c. 9. And the justices for the county had been accustomed to hold, and had the right of holding, county sessions within the city and liberty.

The 11th section of stat. 7 & 8 Vict. c. 71, after reciting the above facts, and that the holding of sessions for the city and liberty had become unnecessary, proceeded to enact that, after the next sessions after the passing of the act, sessions of the peace in and for the city and liberty should cease to be holden, and the sessions in and for the county of Middlesex should be holden by adjournment within the city and liberty, and should have full jurisdiction over all things cognisable by the sessions for the city and liberty; and that *the inhabit- [*273 ants of the city and liberty should not be exempted from serving on juries at the sessions of the peace for the county of Middlesex to be holden within the said city and liberty.

By the 12th clause it was enacted that the persons holding the several offices of high bailiff of Westminster, clerk of the peace, and all other

offices of the Court of sessions of the peace for the said City and Liberty, shall, so long as they shall be entitled to hold their several offices, execute the duties and be entitled to the emoluments within the said City and Liberty of the several offices of sheriff, clerk of the peace, and other corresponding officers of the county of Middlesex. Provided always, that the records of every session of the peace for the said county holden within the said City and Liberty shall be sent, within fourteen days after such session, by the clerk of the peace of the said City and Liberty, to the clerk of the peace of the said county, and shall be kept by him with the other records of his office.

The question was, Whether, upon the construction of the 12th section, the clerks of the peace, high bailiff and other officers for the City and Liberty, who had still some duties to perform not connected with the sessions, were always to perform the duties and receive the emoluments of the offices for the county at the sessions holden in Westminster, or whether the persons who were the clerks of the peace, high bailiff and other officers for the city at the time of the passing of the Act were the only persons who were intended by the Act to be placed in the situation of performing the functions and receiving the emoluments of the officers of the county at the county sessions during their continuance in office:

*274] in other words, whether the provision was to be a perpetual arrangement or only a temporary arrangement for the protection and compensation of the officers who would otherwise have been injured by the operation of the 11th section in destroying their offices as officers of the city sessions, and putting an end to their functions as such.

The person who was clerk of the peace for the City and Liberty had died since the passing of the Act: and the plaintiff had been since appointed clerk of the peace for the City and Liberty. If the arrangement in question were a permanent one, he was entitled to perform the duties and receive the emoluments in question. If the arrangement were to end at the death of the person in office at the passing of the Act, or upon his ceasing to hold office, the plaintiff had no title.

I am of opinion that the arrangement was a temporary one, intended for the compensation and protection of the vested interest of the then clerk of the peace; and that it was to continue only during his life and continuance in office, so as to terminate on his death or resignation.

The 11th section entirely abolishes the Court, and enacts that it should no longer be holden: and, in abolishing the Court, the functions in question were necessarily abolished; and with the functions the fees also would necessarily be done away with. The Legislature would naturally, therefore, be expected to make provision for the loss and injury to the parties to be affected by the change. But there was no occasion to make provision with respect to persons having no vested interest, but who might take office in the altered state of the law. It would be novel in our legislation to make provision for such persons, *275] who are entitled to no compensation as they have lost nothing by the enactment, having sought for and accepted office subsequently to the change. It is to be observed that, the 11th section having put an end to the Court and the offices, the functions and the emoluments, and the old rights being entirely gone, it lies on the parties claiming the new rights given by the 12th section to bring themselves within it. If the words are so ambiguous that they cannot be certainly

said to confer the new rights on the individuals claiming to be within the new enactments, the party so claiming must fail. I think that the defendant is right in his assertion, not merely that the words may be ambiguous, but that they appear more favourable to the construction by which the arrangement is regarded as temporary only, in the nature of a compensation clause, in favour of the parties holding office at the time of the passing of the Act, and suffering from the consequences of its enactments, than to the construction by which the arrangement would be treated as permanent. I think that such an anomalous arrangement was not likely to be intended for a permanent one; and that the provisions for carrying out the arrangement are quite as well, if not better, adapted for a temporary arrangement. The expression, the *persons holding* the several offices of high bailiff, &c., will without much straining apply perhaps to either view of the case. It strikes me, *primâ facie*, as intended to refer to *persons now*, that is at the time of the passing of the Act, *holding*. I think that some expression to show that it meant "for the time being" should, and probably would, have been inserted if it had been intended otherwise than as a compensation for the parties then holding office. And I think that the more probable construction *is that the persons now holding office were intended. [*276 If it had not been introduced to point to the particular persons, it would have been much more simple to have said the high bailiff, the clerk of the peace, &c., with or without the words "for the time being," should execute the functions, than to use the expression "*persons holding*," &c., which certainly appears, in my judgment, rather to point to the particular *persons* then holding the offices. I think that the subsequent words in the paragraph, "so long as they shall be entitled to hold their several offices," are strong to show that the enactment was intended to apply to the *persons then in office*, and not to subsequent high bailiffs and clerks of the peace. The words "*the persons holding*," &c., "so long as they shall be entitled," seem to me to refer to the then holders personally. If the enactment is to be read as high bailiffs and clerks of the peace for the time being, there could be no use for, or occasion to insert, these words of qualification, "so long as they shall be entitled to hold their several offices;" as on ceasing so to hold they would be no longer high bailiffs or clerks within the enactment. Whereas some such words seem to me to have been absolutely necessary, according to the view I take of the meaning of the words "person holding." If the enactment was intended to give a compensation to the person holding the office, it was absolutely necessary to qualify what had preceded by saying "so long as they shall be entitled to hold their several offices:" otherwise, the right being given to the *persons*, these *persons* would have been entitled to perform the duties and receive the fees after they had no right to be, or ceased to be, clerks of the peace for the City and Liberty. The meaning would be: "We give *you this compensation for what you have lost as clerk of the peace for Westminster: but we do not mean it to continue when you would not have been acting as clerk of the peace on the old arrangement: and, if you cease to be clerk of the peace, as you would have lost nothing we give you nothing." I see no difficulty whatever in everything on the death of the particular officers falling into the regular course of a quarter sessions for the county. [*277

I think that the object of the statute was to do away with the practice of having two courts of session and two sets of functionaries, and to bring everything within the cognisance of the county sessions, and to leave that as the sole Court, keeping some of the old functionaries pro tempore who might otherwise have complained of the new arrangement.

After the death of those functionaries, there will be found no difficulty in the sheriff and the clerk of the peace of the county assuming the usual functions as to the county sessions. For this purpose, what seems to have been an old exemption of the inhabitants of Westminster from serving on the juries at the county sessions was abolished, so far as the adjourned county sessions at Westminster are concerned. There would be no difficulty in the sheriff summoning these persons in the usual way: and probably in practice he would summon the juries from the other parts for the Clerkenwell sessions. An inconvenience which would have occurred during this temporary arrangement, however, was foreseen and provided for by the legislature. The Courts being thenceforth to be Courts of county sessions, the keeping of records ought to be in the hands of the proper custodiers of the county records: persons requiring *278] recourse to such documents would naturally go to the clerk of the peace of the county; and it was highly desirable that the temporary arrangement should not prevent the records of the county being all kept together in the hands of one recognised officer. Indeed, but for the provision I am about to refer to, doubts might have arisen as to who was the proper custodian of the records, and the party entitled to make copies, and give certificates under acts of parliament which make them evidence in some cases if signed by the officer having the proper custody. To remedy such inconvenience, and prevent such doubts, the legislature enacted, in effect, that the clerk of the peace for the city, when acting for the county sessions, should, within fourteen days after each sessions, send the records of that session to the clerk of the peace for the county, to be kept by him with the other records of his office. It is quite true that this provision would be by no means inapplicable to the case of a permanent arrangement: but it is not at all inconsistent with, and seems to me to have been absolutely necessary with a view to, a temporary arrangement. It is a *provisio* upon, and should I think be construed to refer to, the subject-matter of the preceding part of the section; which, as I understand it, is the session holden under the temporary arrangement.

Upon the whole, I think that the true construction of the 12th section of the statute in question is, that the arrangement should be temporary. And, if it be doubtful, the 11th section having abolished the Court, and thereby the functions and fees in question, it seems to me that the party claiming the new right under the 12th section must bring himself within it by showing clearly that the legislature has intended the Act to apply *279] to a case like the present: and, he not having done so, I think that our judgment ought to be for the defendant.

WIGHTMAN, J.—The question in this case is, whether the clerk of the peace for the City and Liberty of Westminster for the time being is entitled, under the 12th section of stat. 7 & 8 Vict. c. 71, to the emoluments of the office of clerk of the peace arising within the City and Liberty, or whether the right to those emoluments was by that statute

limited to the clerk of the peace for the City and Liberty who held the office at the time the Act was passed.

The Act recites that the holding of sessions of the peace for the City and Liberty had become unnecessary, and that the sessions for the county of Middlesex should be holden by adjournment within the City and Liberty, and should have jurisdiction over all things cognisable by the sessions for the City and Liberty; and that the inhabitants of the City and Liberty should not be exempt from serving on juries at the sessions of the peace for the county of Middlesex holden within the said City and Liberty.

It then enacts, by sect. 12, that the persons holding the several offices of high bailiff of Westminster, clerk of the peace, and all other officers of the Court of sessions of the peace for the said City and Liberty, should, so long as they should be entitled to hold their several offices, execute the duties, and be entitled to the emoluments, within the said City and Liberty, of the several offices of sheriff, clerk of the peace, and other corresponding officers of the county of Middlesex, with a proviso that the records of every session of the peace for the said county, holden within the said City and *Liberty, should be sent within fourteen [*280 days after such session by the clerk of the peace of the said City and Liberty to the clerk of the peace of the county, and be kept by him with the other records of his office.

The clerk of the peace for the City and Liberty has other duties to perform besides those that may be incidental to the holding the general or quarter sessions. And it appears to me that the legislature did not intend to abolish the office upon the death or resignation of the person who held the office at the time the Act passed. It provides generally that the persons holding the several offices enumerated (the clerk of the peace being one) should, so long as they should be entitled to hold their several offices, execute the duties and be entitled to the emoluments (within the City and Liberty) of the several enumerated offices, clerk of the peace being one. This provision, I think, applies to the clerk of the peace and other offices enumerated for the time being, and is not limited to the persons who held the offices when the Act was passed. There are no words of limitation: and, as the offices still exist, there seems no sufficient ground for holding that the persons filling those offices for the time being are precluded by the Act from the executing the duties and receiving the emoluments of their respective offices within the City and Liberty. Any difficulty as to the records is obviated by the proviso to the 12th section, that the clerk of the peace of the City and Liberty should send them to the clerk of the peace of the county within fourteen days after each session.

I therefore answer the first question in the affirmative, being of opinion that the 12th section of the Act extends to the plaintiff.

*With respect to the second and third questions, I am of opinion that the plaintiff is entitled to the emoluments of all business [*281 actually transacted at the sessions holden within the City and Liberty, to which the clerk of the peace for Middlesex would otherwise be entitled.

The learned Judge then proceeded to read the judgment of

COLERIDGE, J.—After much hesitation, I am of opinion that the provisions of the 12th section of stat. 7 & 8 Vict. c. 71, were intended to

be permanent. The 11th section puts an end to the Westminster City sessions, but provides that sessions of the peace shall still be held within the City, being county sessions held there by adjournment. But, as the officers, some if not all, and those the most important, who had previously functions to perform and emoluments to receive in and from the City Sessions Court, were for other purposes still to remain, I see no reason a priori why these officers should not have been permanently preserved: and, if there be no such reason, why should force be used to the language of the section which in its ordinary meaning had nothing in it to limit its effect to any particular times or persons, but is exactly such as might properly be used in the framing a permanent provision? The case to be provided for was the performance of duties properly incumbent on county officers by officers holding analogous situations in the City: and this is most properly effected by providing that the individuals holding those city offices should, so long as they hold them, perform those county duties. Words which are not in the

*282] Act must be introduced in order to effect *the limitation which my Brother Crompton insists on. The proviso which follows confirms me in my opinion: for what it directs to be done would be wholly unnecessary if the clerk of the peace for the county were officiating at the adjourned sessions, but would be absolutely necessary if the City clerk of the peace officiated. And the language of this proviso is absolutely without any restriction in point of time. On these short grounds I agree to the judgment pronounced by my brother Wightman.

Lord CAMPBELL, C. J.—I have entertained considerable doubts as to the right construction of the 12th section of this very loosely drawn Act of Parliament. The plan of making the arrangement only temporary, to last only while those who were in office when the Act passed should be entitled to hold their several offices, seems more reasonable than that in *sæcula sæculorum* there should be an entirely different set of officers for the same tribunal when sitting in a particular district within its jurisdiction. And part of the language of the 12th section rather intimates that such was the intention of the Legislature.

But the concluding enactment, that the records of every session of the peace for the said county holden within the said City and Liberty shall be sent within fourteen days after such session by the clerk of the peace of the said City and Liberty to the clerk of the peace of the said county, and shall be kept by him with the other records of his office, has rather the aspect of perpetuity. However, as this comes by way of proviso, the meaning may be that it shall apply only to "the records

*283] *of every session of the peace for the said county holden within the City and Liberty," *while the individual who was clerk of the peace for the City and Liberty when the Act passed shall be entitled to hold his office.*

I therefore concur in opinion with my Brother Crompton, who has so copiously commented on the statute.

CROMPTON, J., then withdrew his opinion, in order that judgment might be pronounced and an appeal be brought: and judgment was formally entered for the plaintiff.

IN THE EXCHEQUER CHAMBER.

CHARLES ARTHUR HILL HEATON ELLIS, Appellant, v.
RICHARD NICHOLSON, Respondent.

[For syllabus, see *antè*, p. 267.]

THE defendant having appealed against the above judgment, the case was argued in the Exchequer Chamber in Trinity Vacation, 1858.(a)

Montague Smith, for the appellant (defendant below).—It is obvious, both from the general object of the statute and the words of sect. 12, that only a temporary arrangement was contemplated by the Legislature. In consequence of the abolition of the sessions for the City and Liberty, it became unnecessary to maintain offices *for the discharge of the functions belonging to those sessions: but, as the parties then in office would suffer loss by an unconditional abolition of the offices, it was thought fit to make some compensation to them. This might have been done by a pecuniary sum: but, instead of that, it was effected by giving them a life interest in the office. That was done by sect. 12; and the marginal note properly describes the effect: "officers belonging to the City of Westminster to be compensated while executing their duties." If the intention had been to make the offices permanent, the enactment would have been that "the high bailiff of Westminster, clerk of the peace, and all other officers," should execute the duties: but, instead of that, the enactment is that "the persons holding the several offices," &c., shall do so, thus applying the provision to the particular individuals then in office, and to them only so long as they should continue to be in office. On the respondent's view, the words "so long as they shall be entitled to hold their several offices" would be unnecessary: for, if the words "for the time being," or anything equivalent, could be understood, the enactment could take effect only while the party claiming held the office. "The persons holding" means "the persons now holding," not the persons who may hereafter hold. The effect of the respondent's construction would be to increase the emoluments of the clerk of the peace for Westminster, by adding to his former fees those for the county business. The utmost inconvenience and anomaly would result from keeping up two bodies of functionaries to perform the same duties.

T. F. Ellis, for the respondent (plaintiff below).—The *words "the persons holding" are equivalent to the words "whatever persons shall hold," or, which would come to the same thing, to the words "holding at any time." [BRAMWELL, B.—You vary the expression, and thus escape from the argument founded on the actual expression.] The actual expression is unlimited: the appellant seeks to limit it by introducing the word "now." It is to be observed that the offices comprehended in the enactment are very few: it is not the case of a large class, like that of the corporate officers holding office at the time of the passing of the Municipal Corporation Act, whom it was necessary to describe as a class; 5 & 6 W. 4, c. 76, s. 66: and if it had been here intended only to compensate the particular persons, the more usual course would have been taken of naming them; as in the case of the

(a) June 16th. Before Williams and Willes, Js., and Watson and Bramwell, Bs.

Welsh Judges, stat. 11 G. 4 & 1 W. 4, c. 70, s. 24; and that of the chaplains of the House of Commons protected by stat. 1 & 2 Vict. c. 108, s. 5. It is admitted in the case that the offices are not abolished by the Act, even after the death of the party holding at the time of the Act, because the officers have still functions to perform. Now suppose that which, it will be conceded, is meant by the enactment had been introduced in express terms: suppose the enactment had been, "Whereas the offices of high bailiff, clerk of the peace, and of other officers, of Westminster are to continue permanently, be it enacted that the persons holding these offices shall, so long as they are entitled to hold them, perform," &c.: in that case there could be no doubt that the performance would have been as permanent as the office. Yet what difference can it make, whether the Legislature proceeds upon a state of things *286] expressly recited or upon a state of things assumed by *them to exist? In order to show that the intention was merely to give personal compensation, the marginal note is relied upon. That is no part of the enactment: it does happen that the marginal note was framed for the clause when the clause was framed in another way, but was not altered upon the amendment. [*M. Smith* objected to this being stated.] The Court will not regard either the argument or the answer. But the rest of the statute shows that this is not a compensation, or is, at any rate, not confined to compensation. The clerk of the peace has new duties to perform. Nor is there any anomaly in the same tribunal making use of different functionaries at different places: the case may be likened to that of registrars for different districts of the same county court. Then it is suggested that the words "so long as they shall be entitled to hold their several offices" show that the life, or tenure, of the then present holder only was looked to. But the words, in truth, suggest the opposite inference; their object clearly was to attach the duty and emoluments to the office and not to the person. So the argument put by Crompton, J., seems untenable. The learned Judge suggests that, on the view contended for by the respondent, the words would have been "the bailiff," &c., and not "the person holding," &c. But then it might well have been urged that the particular bailiff, &c., was meant, and no other. The arrangement insisted upon by the appellant would be of the utmost complication; for, according to that, the new system could be introduced only by instalments, as one officer after another died or quitted office: so that there would be an old City functionary or functionaries acting with the new county functionary till all the offices had changed hands. It is said by Crompton, J., that the *287] burthen of *the argument lies on the respondent: but it is the appellant who is bound to show that an existing office is to be abolished; and, if the statute be ambiguous, the respondent is entitled to the benefit of the doubt. Lord Campbell, C. J., who pronounced for the appellant, allowed that an inference against him was raised by the provision that the records of the Court should be sent by the clerk of the peace of the Liberty to the clerk of the peace of the county, which "has rather the aspect of perpetuity." To meet this, his Lordship proposed to insert the words "while the individual who was clerk of the peace for the City and Liberty when the Act passed shall be entitled to hold his office." But this is making a new enactment. And what is to be done with the old records? To carry out the appellant's view in this

respect, a fresh enactment must be added, that the clerk of the peace of the county shall take custody of the old records. So a fresh enactment will be wanted authorizing the sheriff to perform the duties of high bailiff after the death of the then high bailiff.

Montague Smith was heard in reply.

Cur. adv. vult.

WILLES, J., in the same Vacation (July 5th), delivered the judgment of the Court.

In this case the learned Judges of the Court of Queen's Bench were equally divided in opinion. We have considered the judgments there delivered, and the arguments which have been urged in this Court, and the statute, and have certainly felt that there was much to be said in support of either view.

*But, after some doubt, we have come to the unanimous opinion [*288 that the judgment formally given in favour of the plaintiff should be reversed, and judgment given according to the opinion of Lord Campbell and Crompton, J. The interpretation put upon the section by my Brothers Coleridge and Wightman would introduce an anomaly into the working of the Court of sessions; whereas, on the opposite view, the functions of the officers of that Court will, after the deaths of those who were in office when the Act passed, be performed uniformly and without the inconvenience of throwing the business into the hands of different officers according to the place at which the Court is held.

In this latter view, the section upon which the question turned is read as providing compensation for existing officers, and not as creating a perpetual inconsistency in the working of the Court. We adopt this as the most reasonable and probably correct construction. And the judgment is therefore reversed.

Judgment reversed.

*ANTHONY JOHN WRIGHT BIDDULPH *v.* MARY LEES [*289
and Others. *May 8.*

R had one brother C., and two sisters M. and A.; and C. had three sons, J., C., and T. In this state of the family, R., by will made in 1765, devised land of which he was seised in fee simple to his brother C. for life, remainder to trustees to preserve contingent remainders, remainder to J. for life, remainder to trustees to preserve contingent remainders, remainder to the first son of the body of J., and the heirs male of the body of such first son lawfully issuing; "and, for default of such issue," to the second, third, fourth, fifth, sixth, seventh, and all and every son and sons of the body of J., severally and successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, and of the several and successive heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons, and the heirs male of his body, being always preferred and to take before the younger of such son and sons, and the heirs male of his body; "and, for default of such issue," similar limitations to R.'s brother's son C., and to his sons in tail male; "and, for default of such issue," similar limitations to T., and to his sons in tail male; "and, for default of such issue," to the fourth, fifth, &c., and all and every, son and sons of the body of R.'s brother C., lawfully to be begotten, successively, in tail male; "and, for default of such issue," to all and every the daughter and daughters of R.'s brother C., and her and their heirs for ever, to take as tenants in common (if more than one), and not as joint tenants; "and, for default of such issue," similar limitations to the daughters of J.; "and, for default of such issue," similar limitations to the daughters of R.'s brother's son C.; "and, for default of such issue," similar limitations to the daughters of T.; "and, for default of such issue," similar limitations to all and every the daughter and daughters lawfully to be begotten by the fourth, fifth, &c., sons of R.'s brother

C., the daughters of the elder of such after born sons of the brother to take and be preferred before the daughters of the younger; "and, for default of such issue," to R.'s sisters M. and A., and their heirs for ever, as tenants in common, and not as joint tenants. In a later part of the will was contained a shifting clause, providing that, if any of the nephews J., C., or T., or any after born son of R.'s brother C., should enter into religion and become a professed priest of any order of the church of Rome, or if any of the daughters of R.'s brother C. or of the nephews J., C., and T., or of any after born son of R.'s brother C., should enter into religion and become a professed nun, immediately thereupon, the uses limited as to such nephew or after begotten son as should so enter into religion, &c., or of such daughter who should so enter into such religion, &c., "shall cease, determine, and be absolutely null and void to intents and purposes whatsoever: and that the person or persons next in reversion to take, according to my afore-mentioned limitation, shall immediately thereupon enter into and upon my said manors," &c., "and hold and enjoy the same in as full a manner, to all intents and purposes whatsoever, as he, she, or they would have been entitled to have held, and enjoyed the same in case the person or persons so entering into religion as aforesaid had been then dead, without issue of his, her, or their body or bodies as aforesaid."

Held, by the Court of Exch. Ch., affirming the judgment of the Court of Q. B., that the limitations to the daughters gave interests, not in fee simple, but in fee tail general; for that the words "for default of such issue," following the limitations to the daughters, must be understood as meaning "for default of such issue of the body of the daughter."

Semle, by the Court of Exch. Ch. (dissentiente Martin, B.), and by the Court of Q. B., that, but for the occurrence of the shifting clause, the previous limitations would have been construed as giving interests in fee simple to the daughters.

EJECTMENT against the tenants of lands, &c., parcel of an estate called The Grange Estate in *Staffordshire. Thomas Baron *290] Camoys defended as landlord for one undivided moiety; and Thomas Barnewall and five others, as assignees of Anthony George Wright Biddulph, a bankrupt, defended as landlords for the other undivided moiety.

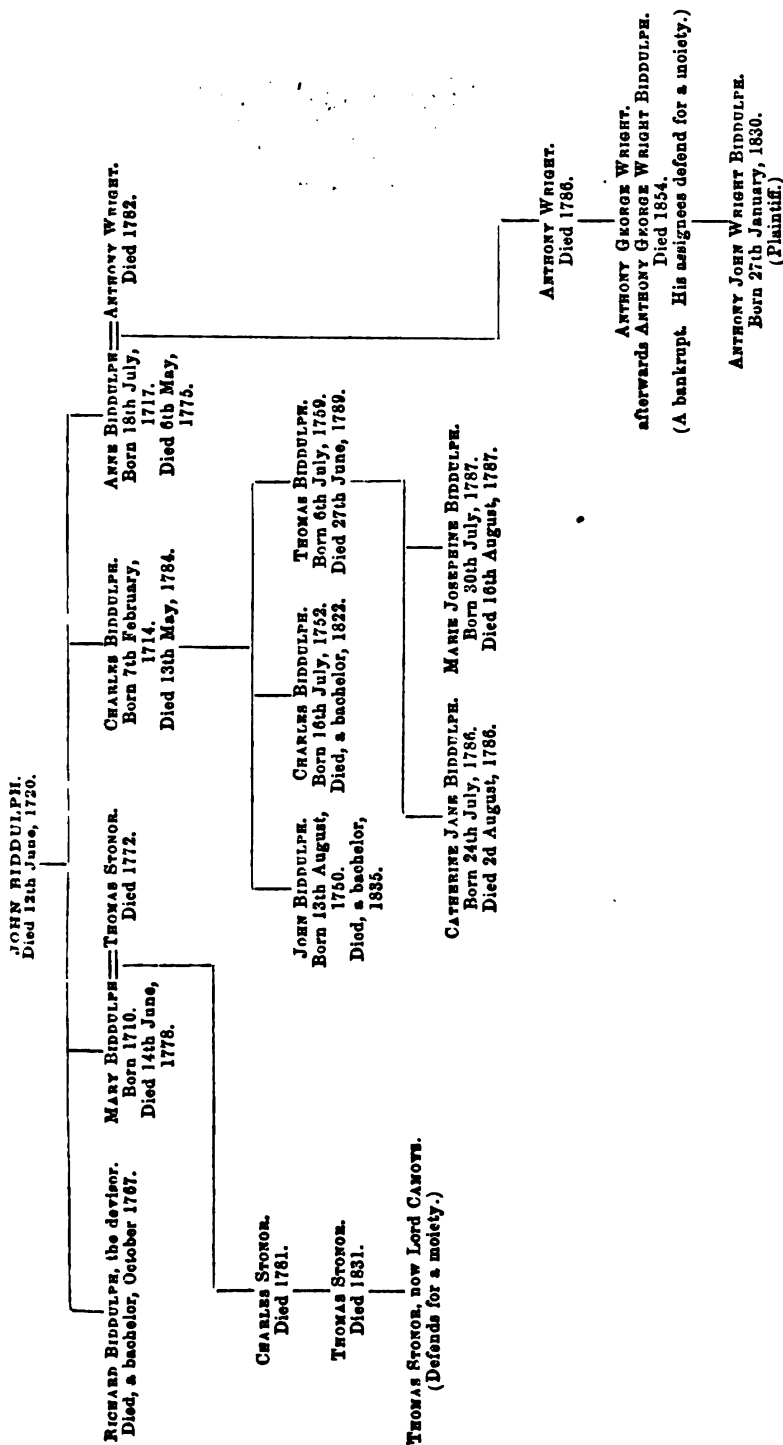
On the trial, before Lord Campbell, C. J., at the Middlesex Sittings after Trinity Term 1856, a verdict was found for the plaintiff, subject to the opinion of this Court on a special case.

The case stated that Richard Biddulph, being seised in fee and in possession of divers real estates in Staffordshire, Surrey, and Sussex, including The Grange Estate (the subject of the action), by his will, duly executed, &c., dated 12th April, 1765, bequeathed all his real estates in Staffordshire, Surrey, and Sussex, "unto my brother-in-law, Anthony Wright," of, &c., "and my nephew, Charles Stonor, of," &c., "their heirs and assigns, for ever: to the several uses, estates, intents and purposes, and upon such trusts, as are hereafter by this my will particularly mentioned, limited, expressed, declared, and appointed; and to or for no other use or uses, estate, intent, or purpose whatsoever (that is to say): to the use and behoof of my brother Charles Biddulph, of," &c., "for and during the term of his natural life, without impeachment," &c. "And, from and after the determination of that estate, to the use and behoof of the said Anthony Wright and Charles Stonor, their heirs and assigns, for and during the natural life of the said Charles Biddulph, upon trust," &c. (to preserve contingent remainders). "And, from and after the decease of my said brother Charles Biddulph, to the use and behoof of my nephew John Biddulph, the eldest son of my said brother Charles Biddulph, for and during the term of his natural life, without *291] *impeachment," &c. "And, from and after the determination of that estate, to the use and behoof of the said Anthony Wright and Charles Stonor, their heirs and assigns," &c. (to preserve contingent remainders). "And, from and after the decease of my said nephew John Biddulph, to the use and behoof of the first son of the body of my

said nephew John Biddulph lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing. And, for default of such issue, to the use and behoof of the second, third, fourth, fifth, sixth, seventh, and all and every other son and sons of the body of my said nephew John Biddulph lawfully to be begotten, severally and successively, and in remainder one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons and the heirs male of his body being always preferred, and to take before the younger of such son and sons and the heirs male of his body. And, for default of such issue, to the use and behoof of my nephew Charles Biddulph, the second son of my said brother Charles Biddulph, for and during the term of his natural life, without impeachment," &c. "And, from and after the determination of that estate, to the use," &c. (trustees to preserve contingent remainders). "And, from and after the decease of my said nephew Charles Biddulph, to the use and behoof of the first son of the body," &c. (limitations as in the case of the sons of John). "And, for default of such issue, to the use and behoof of my nephew Thomas Biddulph, the third son of my said brother Charles Biddulph, for and during the term of *his natural life, without impeachment," &c. [*292 "And, from and after the determination of that estate, to the use," &c. (trustees to preserve contingent remainders). "And, from and after the decease of my said nephew Thomas Biddulph, to the use and behoof of the first son of the body," &c. (limitations as in the case of the sons of John). "And, for default of such issue, to the use and behoof of the fourth son of the body of my said brother Charles Biddulph lawfully to be begotten, and of the heirs male of the body of such fourth son lawfully issuing. And, for default of such issue, to the use and behoof of the fifth, sixth, seventh, eighth, ninth, and tenth, and all and every other son and sons of the body of my said brother Charles Biddulph lawfully to be begotten, severally and successively and in remainder one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such last-mentioned son and sons lawfully issuing, the elder of such last-mentioned son and sons, and the heirs male of his body, being always preferred, and to take before the younger of such last-mentioned son and sons, and the heirs male of his body. And, for default of such issue, to the use and behoof of all and every the daughter and daughters of my said brother Charles Biddulph lawfully to be begotten, and her and their heirs for ever, to take as tenants in common (if more than one) and not as joint tenants. And, for default of such issue, to the use and behoof of all and every the daughter and daughters of my said nephew the said John Biddulph lawfully to be begotten, and her and their heirs for ever, to take as tenants in common (if more than one) and *not as joint tenants. [*293 And, for default of such issue, to the use and behoof of all and every the daughter and daughters of my said nephew the said Charles Biddulph lawfully to be begotten, and her and their heirs for ever, to take as tenants in common (if more than one) and not as joint tenants. And, for default of such issue, to the use and behoof of all and every the daughter and daughters of my said nephew the said Thomas Bid-

dulph lawfully to be begotten, and her and their heirs for ever, to take as tenants in common (if more than one) and not as joint tenants. And, for default of such issue, to the use and behoof of all and every the daughter and daughters lawfully to be begotten by such fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every other son and sons of my said brother Charles Biddulph as aforesaid, and her and their heirs for ever, to take as tenants in common (if more than one) and not as joint tenants. The daughter and daughters of the elder of such after-born son and sons of my said brother Charles Biddulph as aforesaid to take and be preferred before the daughter and daughters of the younger of such after-born son and sons. And, for default of such issue, to the use and behoof of my sisters Mary Stonor, the wife of Thomas Stonor, of," &c., "and Ann Wright, the wife of my said brother-in-law Anthony Wright, and their heirs for ever, as tenants in common, and not as joint tenants." At a later part of the will, the following shifting clause occurred. "Provided also, and it is my further intent and I do hereby declare my will and meaning to be, that, if at any time hereafter my said nephews the said John Biddulph, Charles Biddulph, and Thomas *294] Biddulph, or any or either of them, or any such *other after-born son or sons of my said brother Charles Biddulph as aforesaid, or any or either of them, shall enter into religion, and become professed priest or priests of some or one of the several orders now used or professed in the church of Rome, or otherwise become priest or priests of the secular clergy in the said church; or if at any time hereafter all or any of the daughter or daughters to be begotten by my said brother Charles Biddulph, or by my said nephews the said John Biddulph, Charles Biddulph, and Thomas Biddulph, or either of them, or by any or either of such after-born son or sons of my said brother Charles Biddulph as aforesaid, shall enter into religion, and become professed nun or nuns: that then, and in such case and immediately thereupon, the use and uses by me before limited and declared of my said manors, messuages, farms, lands, hereditaments, and premises, as to such of my said nephews the said John Biddulph, Charles Biddulph, and Thomas Biddulph, and all and every such after-born son or sons of my said brother Charles Biddulph as aforesaid, as shall so enter into religion and become professed priest or priests of the church of Rome as aforesaid, or as to such the daughter or daughters of my said brother Charles Biddulph as aforesaid, or the daughter or daughters of my said nephews the said John Biddulph, Charles Biddulph, Thomas Biddulph, and all and every or any of such after-born son or sons of my said brother Charles Biddulph as aforesaid, as shall so enter into religion, and become professed nun or nuns as aforesaid, shall cease, determine, and be absolutely null and void to all intents and purposes whatsoever: and that the person or persons next in reversion to take, according to my *295] *afore-mentioned limitation, shall immediately thereupon enter into and upon my said manors, messuages, farms, lands, and premises, and hold and enjoy the same in as full a manner, to all intents and purposes whatsoever, as he, she, or they would have been entitled to have held and enjoyed the same in case the person or persons so entering into religion as aforesaid had been then dead, without issue of his, her, or their body or bodies as aforesaid."

The case then gave an account of the different members of the family,



and also set forth certain evidence, the admissibility of which was disputed but was finally allowed in argument, and the finding of the jury thereon. The result was as shown in the table on preceding page, which omits mention of several members of the family who were dead without issue before 12th April 1765, the date of Richard Biddulph's will.

*297] On Richard Biddulph's death, his brother Charles Biddulph entered, and held till his death. He died intestate as to real estate. The said Charles Biddulph had no child born after the date of Richard Biddulph's will.

On the said Charles Biddulph's death, John Biddulph entered, and held till his death.

Thomas Biddulph had no son.

John Biddulph, by his will duly executed, &c., dated 29th September, 1828, devised all his lands (with an exception not now material) to Anthony George Wright (afterwards Biddulph, the father of plaintiff) for life, remainder to trustees to preserve, &c., remainder to the first and other sons of Anthony George Wright, successively, in tail male; remainder over. He died without revoking this will, leaving the defendant Lord Camoys and Anthony George Wright his coheirs at law.

On the death of John Biddulph, in 1835, the defendant Lord Camoys, as heir of Mary Stonor, and Anthony George Wright, as heir of Ann Wright, entered into possession of The Grange estate in equal moieties.

In 1840, Anthony George Wright Biddulph was declared a bankrupt: and his assignees entered into a moiety of The Grange estate.

The plaintiff contended that the two daughters of Thomas Biddulph took, under Richard Biddulph's will, an interest in fee simple, subject only to the preceding limitations in the will; that, on their deaths, their interests devolved on John Biddulph as their heir at law; and that the plaintiff, under John Biddulph's will, became entitled as tenant in tail male.

The question for the Court was, whether the plaintiff was entitled to recover.

*298] The case was argued in this Term.(a)

Hugh Hill, for the plaintiff.—If, under the will of Richard Biddulph, Catherine Jane and Marie Josephine took a remainder in fee simple as tenants in common, their heir at law took an estate in fee simple; John, the brother of their father Thomas, was their heir at law; and his will gives the land to the plaintiff in tail male. If Catherine Jane and Marie Josephine took only estates tail, then those estates, as well as the other limitations in tail contained in Richard Biddulph's will, have failed, and the land goes to the heirs of the sisters to whom the ultimate remainder is limited by the will in fee, that is, in moieties, to the heirs of Mary Stonor and Anne Wright, one of whom is represented by the defendant Lord Camoys, the other by the assignees of Anthony George Wright Biddulph. The former construction of the will is the correct one.

First, independently of the shifting clause. The will expressly limits estates in tail male successively to the sons of the testator's brother, Charles Biddulph, and then, after interests given to other daughters, limits the land "to the use and behoof of all and every the daughter

(a) April 30th. Before Lord Campbell, C. J., Erle and Crompton, Js. Wightman, J., also was present during a part of the argument.

and daughters of my said nephew the said Thomas Biddulph lawfully to be begotten, and her and their heirs for ever, to take as tenants in common (if more than one) and not as joint tenants." So far, the limitation is clearly in fee simple. But then follow the words, "and, for default of such issue, to the use and behoof" of the daughters of other sons of Charles Biddulph. And the defendants will contend that these words cut down the estate to a fee tail. *But the words should be construed as meaning "for default of such daughters." In Jarman's [*299 Treatise on Wills, ch. XL. sect. 2 (vol. 2, p. 384, 2d ed.), this is explained: "Where the words are not 'in default of issue' simply, but 'in default of such issue,' it is clear that whatever be the class of issue included in the preceding gift, whether children, sons or daughters, and whatever the extent of interest given to those objects, the bequest over *in default of such issue* is construed to mean in default of such *children, sons or daughters*." And in sect. 3: "With regard to *real estates* also, it is clear that the words 'in default of *such issue*,' following an express devise to any particular [generation] of issue, as *children, sons or daughters*, will be construed to refer to the issue before described; that is, as meaning in default of '*such*' *children, sons, &c.* And in cases of *this class*," "this rule prevails, whether the objects of such preceding devise take *estates* of inheritance, or *only estates for life*." And further, at p. 388: "It is well settled also, that words importing a failure of issue (without the word '*such*') following a devise to *children* in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large." And again, at p. 409: "The words, in *default of issue*, or expressions of a similar import, following a devise to *children in fee simple*, mean in default of *children* [and following a devise to children in tail, mean in default of children or of issue inheritable under the entail]. This is free from all doubt." This was acted upon in *Foster v. Hayes*, 4 E. & B. 717 (E. C. L. R. vol. 82): (a) and *Baker v. Tucker*, 3 H. L. Ca. 106, is to the same effect.

*Next, as to the effect of the shifting clause, which provides [*300 that, if any daughter, the object of the devise, shall become a nun, the uses limited to her shall cease, and the person "next in reversion" shall take, as if the daughter were dead. It will be said that this shows that the daughters were meant to take an estate upon which there would be a reversion, and therefore not a fee simple. The proviso applies equally to the sons if they become priests, &c.: but in their case the reversion is that which is expectant on estates tail; in that of the daughters it is the interest which would take effect on the failure of a devise in fee, which would be the interest of the testator's heir at law. [CROMPTON, J.—Then you consider the limitations over to be in the nature of executory devises, giving interests to arise if there should be no daughters.] They are limitations in the alternative; one set takes effect if the other does not: they are not consecutive.

Sir *F. Kelly*, Attorney-General, for the defendant Lord Camoys.

First, the devise, without the assistance of the shifting clause, would give an estate tail. It is not necessary to dispute the authority of *Foster v. Hayes*, 4 E. & B. 717 (E. C. L. R. vol. 82); 2 E. & B. 27 (E. C. L. R. vol. 75). There is a long series of cases which might be

(a) In Exch. Ch.; affirming the judgment of Q. B. in *Foster v. Hayes*, 2 E. & B. 27 (E. C. L. R. vol. 75).

cited on either side. But, as this devise is worded, it would be necessary, in order to come to the conclusion that the daughters are to take in fee simple, to construe the same expressions differently according as they are applied to the sons or the daughters. It will be found, in the *301] cases, that, wherever one limitation is to be at an end before the *next takes place, the first limitation is treated as giving an estate upon which there may be a remainder, and therefore not an estate in fee. It is to be observed that both in *Foster v. Hayes* and in *Baker v. Tucker*, the limitation in question was to the use of one person only and his issue: and a similar remark applies to *Rex v. The Marquis of Stafford*, 7 East 521. But here the limitations raise uses for different branches successively, so as to afford an inference as to the meaning of one from the necessary meaning of the others. In *Doe dem. Littledale v. Smeddle*, 2 B. & Ald. 126, the question was as to the effect of the word "heirs." Before the phrase "for default of such issue" is applied to the daughters it occurs six times with the meaning unquestionably of issue of the body of the person named. *Morgan v. Griffiths*, 1 Cowp. 254; *Doe dem. Bean v. Halley*, 8 T. R. 5; *Dacre v. Doe dem. Dacre*, 8 T. R. 112; (a) *Ives v. Legge*; (b) *Lewis dem. Ormond v. Waters*, 6 East 336, are authorities for the defendant; the last especially, the successive limitations to the sons being as here, and Lord Ellenborough relying much on the limitations being in succession, with reference to the construction to be put on the words "for want of such issue" as applicable to the sons. Now here the limitations to the daughters differ from those to the sons only in this: that in the former the words may mean an estate tail, but in the latter they must.

*302] But, at any rate, the shifting clause shows that the *daughters were to take only estates tail. It is a rule of construction, as stated in the judgment of this Court in *Foster v. Hays*, 2 E. & B. 33 (E. C. L. R. vol. 75), "that, although there be a limitation in a will in which taken by itself the word 'heirs' must be construed to mean *heirs general*, and to give a fee simple, if there be a subsequent limitation in the will which can have no operation if this effect be given to the word 'heirs,' it shall mean *heirs of the body*, and cut down the prior gift to an estate tail." Now here, if a son or daughter who would be entitled enter into religion, and become respectively priest or nun, the person next in reversion is to take as if the person so entering into religion "had then been dead without issue of his, her, or their body or bodies as aforesaid." But the issue before spoken of, in the case of daughters, is described by the word "heirs:" therefore the heirs of the daughters intended are heirs of the body. [ERLE, J.—Suppose the nephew was dead without issue, the next in reversion would inherit: but if he had a son, the son would be the next in reversion. Suppose the nephew, after having a son, became a Roman Catholic priest: could the son make a title on the ground that he was to come in as if his father had died without issue?] There would, it must be owned, be great difficulty in making the title; nor is it easy to show how the clause could be carried out: but the defendant is not bound to show this; he contends only that the language of the clause should be looked to as interpreting the preceding language. Suppose a daughter, after coming

(a) In *K. B.*, affirming the judgment of *C. P.* in *Doe dem. Dacre v. Dacre*, 1 B. & P. 240.

(b) Note (a) to *Doe dem. Comberbach v. Perryn*, 3 T. R. 488.

into possession, to marry, have a son, become a widow, and then profess: the next in reversion is to take as if the daughter were dead without issue: to give a *meaning to this, it must be supposed that the daughter took an estate tail, not a fee. In fact, the plaintiff [*303 must contend that the shifting clause, or many words in it, must be entirely struck out; for, as it stands, it is quite unintelligible on the supposition that the daughters took a fee simple.

Bovill appeared for the defendants, the assignees of Anthony George Wright Biddulph, and, on *Hugh Hill* objecting to his being heard, admitted that the case of his clients rested upon the same grounds as that of Lord Camoys. The Court desired him to confine himself to one point, on which he was accordingly heard, but upon which the Court ultimately pronounced no decision. *Bovill* also, as to the effect of subsequent words cutting down an estate previously given, mentioned *Biss v. Smith*, 2 H. & N. 105,† *Doe dem. Blandford v. Applin*, 4 T. R. 82, *Woodhouse v. Herrick*, 1 K. & J. 352.

Hugh Hill, in reply.—The construction for which the defendants contend is not reconcilable with the general scheme of the will, which gives first estates in tail male to the nephews' sons, without any limitations in favour of daughters, and then, in default of issue male, gives estates absolutely to daughters, as tenants in common, if there be more than one, to take effect once and for all. The succession of limitations occurs only in the case of males. In this respect the case resembles *Hay v. The Earl of Coventry*, 3 T. R. 83. The shifting clause cannot be taken literally. [Lord CAMPBELL, C. J.—As at present advised, I can hardly think the intention was to *disinherit the son of a [*304 person entering into the religion.] Probably the intention was merely to prevent the estate from being enjoyed by any individual entering into religion; and the language is imperfect because the deviser is attempting to deal at once with three classes of estate, for life, in tail, and in fee simple. If all that follows the words avoiding the estate in the individual be rejected as superfluous, the whole becomes consistent. *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

In this action of ejectment the plaintiff had to make out that the two infant daughters of Thomas Biddulph, who were proved to have been born, and to have died in their infancy, took estates in fee simple under the limitation contained in the will of Richard Biddulph. If this were not made out by the plaintiff, the questions argued before us on the other parts of the title become immaterial. :

By the will in question, Richard Biddulph devised his lands to devisees to uses, to the use of his brother Charles for life; and, after a limitation to trustees to preserve contingent remainders in the usual way, from and after the decease of his said brother Charles Biddulph, to the use of his nephew John Biddulph, the eldest son of Charles Biddulph, for life, with like limitations to trustees to preserve, &c.; and, after the decease of John Biddulph, to the use of the first son of the body of the said John Biddulph lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use of the second, third, fourth, fifth, sixth, *seventh, and all and every other son and sons of the body of John Biddulph, successively, in tail male; and, for default of [*305

such issue, a corresponding series of limitations to Charles, the second son of his brother Charles Biddulph, and his first and other sons in tail male; and, for default of such issue, a corresponding series of limitations to Thomas, the third son of Charles Biddulph, and his first or other sons in tail male; and, for default of such issue, to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every the sons of the body of his brother Charles, in successive estates of tail male; and, for default of such issue, to the use and behoof of all and every the daughter and daughters of his brother Charles Biddulph lawfully to be begotten, and her and their heirs for ever, to take as tenants in common (if more than one) and not as joint tenants; and, for default of such issue, to the use of all and every the daughter and daughters of his said nephew John Buddulph lawfully to be begotten, and her and their heirs for ever, to take as tenants in common (if more than one) and not as joint tenants; and, for default of such issue, corresponding limitations in favour of the daughter or daughters of his nephew Charles; and, in default of such issue, corresponding limitations in favour of the daughter or daughters of his nephew Thomas; and, in default of such issue, over to other uses in favour of the testator's sisters.

If the case depended alone upon the foregoing limitations, we should probably have thought that the daughters of Thomas Biddulph took estates in fee simple, according to the doctrine acted upon in *Hayes v. Foster*, 4 E. & B. 717 (E. C. L. R. vol. 82), 2 E. & B. 27 (E. C. L. R. vol. 75), and many other authorities cited before us, *and
 *306] that the words "for default of such issue," following the devise to the children and their heirs, would have had reference only to the daughters. The change from the language used in the limitations to the sons in tail male, where the strict technical words "heirs male of the body" are used, to the other technical language used in the limitation to the daughters, creating a fee simple by the expression "to their heirs," and the division of the estate amongst the daughters and their heirs as tenants in common, seem strongly to lead to the conclusion that, where the male lines failed, the estate was to go amongst the daughters as tenants in common in fee.

On the other hand, it must be remembered that the words "for default of such issue" are capable of being explained by subsequent parts of the will; and that they are the same words used with reference to all the estates to the sons in tail male; and that the estates to the daughters seem to be intended to be limited in succession. The words as to the sons in tail male, "severally and successively and in remainder one after another, as they and every of them shall be in seniority of age and priority of birth," are indeed more clear and explicit than the words used as to the daughters, by which the estates are limited first to the respective daughters of Charles the brother, and of his sons, and by which it is declared that "the daughter and daughters of the elder of such after-born son and sons of my said brother Charles Biddulph as aforesaid" are "to take and be preferred before the daughter and daughters of the younger of such after-born son and sons." These provisions, however, would seem to show an intention that the daughters
 *307] of each son should take in succession; *and the limitations over to the daughters of the different living and unborn sons, if limitations in fee, would certainly be peculiar, as there would be so great a

number of different alternate contingent limitations, only one of which would take effect, as, when one vested, all the others would be at an end.

The counsel for the defendants, however, mainly relied on the following provision, to be found in a subsequent part of the will, whereby it is provided that, if, at any time thereafter, all or any of the daughter or daughters to be begotten by his said brother Charles Biddulph, or by his said nephews John, Charles, and Thomas Biddulph, or by any or either of such after-born son of his said brother Charles, should enter into religion, and become professed nun or nuns, then and in such case, and immediately thereupon, the uses before limited and declared as to such the daughter or daughters of his brother Charles Biddulph, or of his nephews John Biddulph, Charles Biddulph, and Thomas Biddulph, and of such after-born sons of his brother Charles Biddulph, as should so enter into religion and become professed nun or nuns as aforesaid, should cease and determine, and become absolutely null and void, to all intents and purposes whatsoever; and that the person or persons *next in reversion to take, according to the afore-mentioned limitation*, should immediately thereupon enter into and upon the said manors, messuages, farms, lands, and premises, and enjoy the same, in as full a manner, to all intents and purposes whatsoever, as he, she, or they would have been entitled to have held and enjoyed the same in case the person or persons so entering into religion as aforesaid had been then dead, without issue of his, *her*, or their body or bodies as aforesaid.

*It seems to us impossible to reject this clause, or to read it in any other way than as showing that the testator declared that [*308 the previous successive estates to the daughters were to be remainders in tail. The use of the words "next in reversion," and the express provision that such person next in reversion, to take according to the afore-mentioned limitations, shall, in the event of one of the daughters becoming a nun, enter and enjoy as they would have been entitled to do if the person so entering into religion had been then *dead without issue of his, her, or their body or bodies as aforesaid*, seem to us an express interpretation and declaration of the meaning of the preceding limitations to the daughters.

And we are therefore of opinion that those preceding limitations were successive remainders in tail, and that the daughters of Thomas Biddulph took estates in tail general only; and that the plaintiff failed in this step of his title; which put an end to his case. And our judgment therefore will be for the defendants. Judgment for defendants.

IN THE EXCHEQUER CHAMBER.

[Feb. 4, 1859.]

THE plaintiff in this case having appealed to the Exchequer Chamber, the case was argued on a preceding day (February 3d) by

Manist for the appellant (plaintiff below).

As to the limitations preceding the shifting clause. The words, in the plainest terms, limit successive estates *in tail male to the several sons of the devisor's nephews then existing, and to the several [*309

after-born nephews, which last-mentioned nephews are to have, not, as in the case of the existing nephews, estates for life with remainders in tail male to their issues, but estates in tail male in the first instance. Then follow the limitations to the daughters, all daughters having been excluded in the previous limitations. The daughter of the devisor's brother is to take an estate to her and her heirs for ever; if such brother has more daughters than one, they are to take as tenants in common, and not as joint tenants. There are similar limitations as to the daughters of the first, second, and third existing nephews; and also to the daughters of unborn nephews, which last limitations are perhaps bad for remoteness. It is to be observed that, in the limitation of the estates in tail male to the sons, the language is that of successive limitations; whereas the limitations to the daughters are alternative. Suppose that the devisor's nephew, John, had left a son and a daughter, and such son had left a daughter, and John's daughter had died without issue; suppose also that Thomas had left a daughter who had issue female only: then, upon the failure of issue male of the devisor's nephews, if the estates limited to the daughters of the devisor's nephews be estates tail, the granddaughter of the more remote son would take in preference to the granddaughter of John, who would have no estate at all. But, if the estates limited to the daughters be estates in fee simple, the granddaughter of John would take as heir to her aunt, John's daughter. And there can be little doubt that the devisor meant to prefer the females of elder branches to those of younger branches. The authority of the cases is very strong in favour of construing "such issue" to mean the *310] *daughters, and not the issue of their bodies: *Doe dem. Comberbach v. Perryn*, 3 T. R. 484 (decided in 1789); *Rex v. The Marquis of Stafford*, 7 East 521; *Doe dem. Littledale v. Smeddle*, 2 B. & Ald. 126; *Foster v. Hayes*, 4 E. & B. 717 (E. C. L. R. vol. 82); 2 E. & B. 27 (E. C. L. R. vol. 75); *Jarman on Wills*, ch. XL. sect. 3; *Burton's Elementary Compendium*, p. 268 (7th ed.); *Powell's Essay on Devises*, vol. 2, p. 532 (3d ed.). And it is manifest that this would have been the construction of the Court below, except for the shifting clause. [COCKBURN, C. J.—Subject to what may be said in answer, you may for the present assume that, and discuss at once the effect of the shifting clause.]

The shifting clause is so worded that it cannot be carried out: and the true explanation seems to be that suggested below: namely, that the devisor has attempted to apply the same language to life estates, estates tail, and estates in fee simple. What is meant to be the consequence of a tenant for life, who has a son, becoming a priest? Literally, the son's remainder in tail would be destroyed, because the land is to go over as if the party becoming a priest had died without issue. But that cannot possibly have been the intention. [WILLIAMS, J.—Do you say the clause has no effect at all?] It must affect only the estate of the party professing. In *Dill v. Earl of Haddington*, 8 Cl. & F. 168, 173, there were four events bearing on the question whether a sum of 3000*l.* was to be paid: the gift itself was in clear terms; but it was contended that a subsequent clause affected the meaning. Lord Cottenham, C., said: "It is quite clear that there were four events contemplated." "These several provisions, if they had been provided for in

different clauses of the *settlement, would no doubt have been expressed in very different terms from those which we find upon the face of this deed; but the parties have endeavoured to express all under one provision; and from thence, as it appears to me, has arisen the obscurity. But the mode of dealing with a case of this sort is, first of all, to look at the event which has happened, and then to see whether that part of the deed which is in question in the present discussion does or does not embrace within itself the means of ascertaining the intentions of the parties in that particular event. If that be sufficiently clear, it is not material whether the other events, which have not occurred, are or are not provided for with a degree of obscurity, which, if those events had happened, might have created considerable difficulty as to the construction of the settlement." The Court will not expound the meaning of the devise by a provision made for events which have not occurred. The whole clause bears marks of want of consideration. On the profession taking place, the next in reversion is immediately to enter: but the party professing may have no interest except as a remote remainder-man; so that there may be no one who can enter immediately, perhaps no one who ever can enter. [WILLIAMS, J.—You contend that the obscurity begins earlier, "issue" being used instead of "daughters."'] The meaning of that word, so occurring, is not obscure. [WILLIAMS, J.—That is, since the late decision of *Foster v. Hayes*, 4 E. & B. 717 (E. C. L. R. vol. 82), 2 E. & B. 27 (E. C. L. R. vol. 75). COCKBURN, C. J.—The clause seems to assume that, on the forfeiture of the estate by the party professing, it would not go to the heir general.] It would go to the heir of the devisor. [WILLIAMS, J.—Then, *why is it provided that the estate is to go over as if the party were dead without issue? If the daughter had a fee simple, [312 what would it signify whether she had issue or not?] The earlier part of the clause would take effect by her estate ceasing: the later part is, in the case of the daughters at any rate, superfluous and unmeaning. [MARTIN, B.—I have no doubt at all but that the devisor thought only of the parties professing without having married at all. BRAMWELL, B.—You argue against a particular construction on the ground of consequences which you say would follow from it. Is not the probable solution, that the devisor never thought of the consequence at all?] The fair result seems to be that a clause so confused and contradictory affords no assistance in elucidating the rest of the devise, and cannot be used as a clue to the devisor's meaning. The language used by the Court of Queen's Bench, in *Doe dem. Luscombe v. Yates*, 5 B. & Ald. 544, 554 (E. C. L. R. vol. 7), as to a clause divesting an estate in the event of steps not being taken to adopt a family name, may be applied here: "We are to consider, that this is a proviso introduced to defeat an estate, already vested, for the breach of a condition subsequent, and is in the nature of a forfeiture, and consequently that the words of it must, according to general rules and principles, be construed strictly, and effect must not be given to it, unless the supposed intention of the testator be expressed in plain and unambiguous language." In *Thornhill v. Hall*, 2 Cl. & F. 22, 36, the House of Lords refused to allow an unequivocal gift in one part of a will to be qualified by the inference drawn from the language of a subsequent clause which was not equally

*313] clear and decisive. ***[MARTIN, B.—That case appears to me inapplicable. The defendants apply this clause only to showing in what sense the devisor used his words. COCKBURN, C. J.—You assume that the earlier part is unambiguous. Now the words used in the earlier part gave rise to doubts, which have indeed been solved by the decisions: but the decisions were upon cases in which there was no proviso like this shifting clause. WILLIAMS, J.—You have clear words giving the land to the daughter and her heirs: then the rule is that, if the land is to go over in default of heirs, that is an estate tail.]** In *Doe dem. Gallini v. Gallini*, 5 B. & Ad. 621, 640 (E. C. L. R. vol. 7), in Q. B.,(a) the Court said: “The more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense.” Lord Redesdale, in *Jesson v. Doe dem. Wright*, 2 Bligh 1, 56,(b) said: “There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult, for a professional adviser, to say what is the estate of a person claiming under a will. It cannot at this day be argued, that, because the testator uses in one part *314] of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown.” In *Egerton v. Earl Brownlow*, 4 H. L. Ca. 1, 209,(c) Lord St. Leonards lays down a similar principle. In *Grey v. Friar*, 4 H. L. Ca. 565,(d) the effect of a proviso upon preceding words was discussed.

On this day,

Fleming appearing for the respondents (defendants below), but was not called upon.

COCKBURN, C. J.—It is unnecessary to call on the counsel for the defendants to answer the arguments which have been urged for the plaintiff, as we are unanimously of opinion that the judgment of the Court of Queen's Bench should be affirmed. And, on the view which we take, it is also unnecessary to call upon Mr. *Manisty* for the remainder of his argument. When the will comes to be looked at, although it is true that, conformably with modern authorities, the remainders to the daughters would, if the shifting clause were left out of consideration, be construed as a fee simple, yet we must take the will as a whole, and look at the earlier part in conjunction with the shifting clause. It was argued that, independently of the shifting clause, the words necessarily created a fee simple, and that the shifting clause was inconsistent, and appeared to

(a) Affirmed, on error, in Exch. Ch.; *Doe dem. Gallini c. Gallini*, 3 A. & E. 340 (E. C. L. R. vol. 30).

(b) In Dom. Proc., overruling the judgment of K. B. in *Doe dem. Wright v. Jesson*, 5 M. & S. 95.

(c) In Dom. Proc., reversing the decree of Lord Cranworth, V. C., in *Egerton v. Lord Brownlow*, 1 Sim. N. S. 464.

(d) In Dom. Proc., affirming the judgment of the Exch. Ch., in *Friar v. Grey*, 5 Exch. 597,† which reversed the judgment of the Court of Exchequer, in *Friar v. Grey*, 5 Exch. 584.†

be drawn per incuriam, and that the Court could give no *weight to it. I cannot bring my mind to construe the will in this way. [*315 Mr. *Manisty* argued that, according to modern authorities, the words "for default of such issue," so far as independent of the shifting clause, must be taken to have the meaning upon which he insists: but he overlooked the fact that the will was made as long ago as 1765, and that the rule of law upon which he relies is comparatively modern: indeed, so late as the case of *Foster v. Hayes*, 4 E. & B. 717 (E. C. L. R. vol. 82), 2 E. & B. 27 (E. C. L. R. vol. 75), the very eminent counsel who was Solicitor-General, Sir Richard Bethell, argued that this was not the true construction. And, though the early parts of the will, which are skilfully drawn, might, if taken by themselves, be construed otherwise in conformity with modern authorities, it does not follow that the deviser might not mean to give to the daughters, not an estate in fee simple, but one in fee tail, though not in fee tail male. I think that, in the main, the effect of the authorities is that the words, when they occur as in the earlier part of the will, give a fee simple; but they are not, of themselves, so conclusively binding as to prevent us from coming to a different conclusion when we take into consideration other parts of the will showing that it was not the intention to give a fee simple. That being so, we clearly cannot give effect to the shifting clause unless we suppose the previous words to give an estate tail. I am therefore of opinion that, when we read the earlier words of the will by the aid of the shifting clause, we must construe them as giving an estate tail general to the daughters. The judgment therefore must be affirmed.

*POLLOCK, C. B.—I entirely agree with my Lord Chief Justice, [*316 and am of opinion, with the rest of the Court, that Mr. *Manisty's* argument need not be pursued further, since his remaining points will not arise. I agree, for the reasons assigned by my Lord, and in the Court below. The short point is, whether the daughters take an estate in fee simple or in tail. And it appears to me quite plain, from the manner in which the clause relating to the event of the parties entering into religion is drawn, that the deviser imagined that the will had not exhausted itself by giving a clear fee simple to any one, but that some ulterior estate was left. The only way to give effect to that is by supposing the estate given to the daughters to be one, not in fee simple, but in tail. As the Lord Chief Justice has put it, to express the thing in a narrow compass, the doctrine, according to which the words occurring are construed, was not, at the time when this will was made, so well settled as now. At all events, the expressions are equivocal, and might be construed one way or the other. But, when we refer to the shifting clause, the sense in which the deviser has used the words is placed beyond doubt.

WILLIAMS, J.—I am entirely of the same opinion. I assume the words "for default of such issue," following the devise to the daughters "and their heirs," to mean, according to modern authorities, "for default of such daughters." But, although these words, if unexplained, are to have that meaning; they have no such inflexible meaning, but are capable of being explained. The shifting clause does explain them, so as to lead us to the conclusion that the words here refer, not to daughters, *but to issue of the body of the daughters. When [*317 the shifting clause is looked at, the words admit of no other ex-

planation. I think the judgment of the Court of Queen's Bench fully unanswerable.

MARTIN, B.—I am fully of the same opinion. In *Towns v. Wentworth*, 11 Moore's P. C. C. 526, 548, Mr. Pemberton Leigh, the present Lord Kingsdown, thus laid down the rule as to the construction of a will. "In order to determine the meaning of a will, the Court must read the language of the testator in the sense which it appears he himself attached to the expressions which he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator has by his will excluded, beyond all doubt, such construction. When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will, sufficiently declared." I have read nowhere so good *318] an enunciation of the law. Now, *when this principle is applied to the present case, it is clear that we must affirm the judgment below. The will begins by giving to the devisor's brother Charles for life; then to trustees to preserve contingent remainders; then to the said Charles's son, the devisor's nephew John, for life; then to trustees to preserve contingent remainders; then "to the use and behoof of the first son of the body of my said nephew John Biddulph lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing. And, for default of such issue, to the use and behoof of the second," &c., sons of John successively and the heirs male of their bodies. "And, for default of such issue," similar limitations to Charles, the second son of the devisor's brother Charles and his sons. "And, for default of such issue," similar limitations to Thomas, the third son of the devisor's brother Charles, and his sons. "And, for default of such issue," to the fourth and other sons of the devisor's brother Charles, to be begotten, successively in tail male. The will thus exhausts all the male issue of the devisor's brother Charles. If the will had stopped there, the argument of Mr. *Manisty* would have been irresistible. But it does not stop there: it goes on to limit estates to the daughters of the devisor's brother Charles, and to the daughters of the said Charles's sons. "And, for default of such issue," the remainder is limited to the devisor's two sisters, Mary Stonor, and Ann Wright, in fee, as tenants in common. So that apparently, in this part of the will, the devisor provides for all the male descendants of his brother Charles (apparently his only brother), and then for his brother's female descendants, and the female descendants of his brother's sons; and then, in the event of these *319] all failing, the devisor's two sisters are *to be owners in fee. Mr. *Manisty's* argument was that, upon the birth of the daughters of Thomas after the death of the devisor, the estate would vest in such daughters in fee, and devert the limitations over. Applying Lord Kings-

down's rule, this construction is so inconsistent with the apparent intention of the testator that I would be content to found my judgment on that. On what words does Mr. *Manisty* rely? On the words "and, for default of such issue." Now "heirs" includes issue, but extends to a great deal more. According to Mr. *Manisty*, we are to interpret the words as meaning "for want of such daughter being born." I think we cannot give them that meaning, but must understand them as meaning "for default of heirs of the body." If, therefore, the will had stood there, I should have been prepared to give judgment for the defendants. But then we have the proviso, that in the event of any nephew, or daughter of the devisor's brother, or of his nephews, becoming priest or nun, the "next in reversion" is to take the land. What is the meaning of that? It shows that, when the devisor previously spoke of "heirs," he meant "heirs of the body:" that is as clear to me as if I found it defined in an interpretation clause; as plain as a thing can be. I have not the least doubt in the world. If he had meant otherwise, he would have been making a provision utterly repugnant from his former limitation.

CROWDER, J.—I am of the same opinion; but I found my judgment entirely on the shifting clause. For I think we are bound by *Foster v. Hayes*, 4 E. & B. 717, 2 E. & B. 27, to hold that, *if we had not [320 that clause, the words "for default of such issue" must have been understood as meaning "for default of such daughters." But the shifting clause shows, most satisfactorily, that the devisor, by these words, meant "for default of heirs of the body."

BRAMWELL, B.—I am of the same opinion; and I would limit myself to simply expressing my concurrence in the judgment of the Court, but for this. The words "for default of such issue" are ambiguous; but I think, they, of themselves, would not alter the interest previously limited to the daughters and their heirs. But the shifting clause shows clearly that the words are used by the devisor in the sense of "for default of heirs of the body." Mr. *Manisty* argues that from this construction many consequences would follow which the devisor did not contemplate. My reason for adding these remarks is that I wish to say I consider this argument very fallacious. It is, I think, a mistake to suppose that the devisor contemplated all the consequences which would follow from the disposition which he makes. This assumption is made in many cases respecting real property. I do not profess to be very familiar with such cases: but, in the present case, such an argument is clearly fallacious.

Judgment affirmed.

Devise to testator's daughter H. for life, remainder to her children in fee, "provided that if my said daughter shall happen to *die without issue*," then to the testator's son J. This, in the opinion of Gibson, C. J., in *De Haas v. Bunn*, 2 Barr 337, was sufficient to give a fee simple to the children, with an executory devise over to J., H. having a child at the death of the testator. "The generality of the word issue," said that learned judge, "being restrained by the words child or children, (as) has been satisfactorily shown by the authorities." In *Williams v. Leech*, 28 Penn. St. 89, and *Naglee's Appeal*, 33 Id. 89, however, the operation of the rule which there, and in the principal case, is referred to, was neglected or disregarded.

*321] ***JOHAN NEPONUCK FISHER v. LADISLAUS Graf IZATARAY.** *May 8.*

A commission, having been issued in this cause addressed to individual commissioners to examine witnesses at Pesth, was sent back, unexecuted, through the Austrian embassy, on the ground that the Austrian Government did not permit any but the tribunals of the country to examine witnesses in Hungary. This Court made absolute a rule directing a commission to issue directed to the Imperial Royal Provincial Court at Pesth, to examine the witnesses.

WATKIN WILLIAMS, in this Term, obtained a rule calling upon the plaintiff to show cause why a commission should not issue, directed to the Imperial Royal Provincial Court, or any judge thereof, at Pesth in the kingdom of Hungary, for the purpose of examining witnesses, and why the usual clause, rendering the oath necessary, should not be omitted.

The rule was obtained on an affidavit of defendant's attorney that a commission, addressed to individuals as commissioners at Pesth, had been returned unexecuted, and that the deponent had, on application to the Austrian Embassy, been informed by one of the secretaries of the Austrian Legation that the commission ought to have been directed to the above-named Court.

Lord CAMPBELL, C. J., stated that, in consequence of a communication between the Austrian Embassy and the Foreign Office on this subject, he had had an interview with the Austrian Ambassador, and had learned that the Austrian Government had caused it to be returned, because it prohibited the execution, in Hungary, of a commission directed to individuals, but that no objection would be made to the execution of a commission directed to one of the Courts of that country.

Blackburn now showed cause.—The effect of making this rule absolute will be to delay the plaintiff *indefinitely. If the commission issues to the persons who are the judges of the Court, the Austrian Government will not permit it to be executed; if it is sent to the Court itself, the evidence, when returned, will not be admissible.^(a) Stat. 1 W. 4, c. 22, s. 4, authorizes the issuing of a commission to any persons named in the order, but not to a tribunal. [Lord CAMPBELL, C. J.—We are informed by the Master that a commission issued to the Royal Town Court of Berlin in a case of *The Times Life Assurance Company v. The National Alliance Company*.^(b)] The order there, it is understood, was made by consent of the parties. The objection is not merely on the ground that the words of the statute do not authorize such a commission, but substantial. The Court in Hungary will take the evidence according to the rules of Hungarian law, which no doubt are different from the English laws of evidence. [Lord CAMPBELL, C. J.—I do not know that the Hungarian Court will disregard the rules of English law when acting in aid of an English Court; but, if anything objectionable is admitted by them, it may be objected to at the trial.] At all events, the evidence should be upon oath: the form of the oath need not be prescribed; but the rule as drawn up proposes to omit it altogether. [Lord CAMPBELL, C. J.—The rule must be altered in that

(a) See *Clay v. Stephenson*, 3 A. & E. 807 (E. C. L. R. vol. 30), 7 A. & E. 185, 188 (E. C. L. R. vol. 34), *Lumley v. Gye*, 3 E. & B. 114 (E. C. L. R. vol. 77).

(b) Not reported.

respect, and by omitting the words "or any judge thereof.]" And the costs of the former commission, which has proved abortive without fault of the plaintiff, ought not to be borne by him.

Lush and *W. Williams* were not heard in support of the rule.

Lord CAMPBELL, C. J.—In this case a commission had *issued, [323 at the instance of the defendant, directed to individuals to take evidence in Hungary; and that has proved abortive. It appears, from the information communicated by the Austrian Embassy, that the reason was that the Imperial Government will not permit a commission to be executed by individuals, but that it may be executed by one of the tribunals of the country. Then the application is to us to direct a commission to the Imperial Royal Provincial Court at Pesth. We have no reason to doubt that they will do justice; and I think we have jurisdiction to issue a commission to a tribunal, where, as in this case, to refuse it would be a denial of justice. When the commission is returned, it will be open to Mr. *Blackburn* to object to the reception of the evidence taken under it, either by showing that something objectionable took place before the Court at Pesth, or upon the ground now taken, that we have no jurisdiction to send a commission to a tribunal; but in the meantime it must go. It is, however, very fair that the plaintiff's costs occasioned by the abortive commission should be the plaintiff's costs in the cause at all events.

WIGHTMAN, ERLE, and CROMPTON, Js., concurred.

Rule absolute.

The rule, as drawn up, was for a commission to issue "to the Imperial Royal Provincial Court at Pesth in the kingdom of Hungary, for the purpose of examining witnesses, on the part of the defendant, on oath; and that the usual clause, prescribing the form of the oath, should be omitted." (a)

(a) The Commission was sent out, but never returned.

*MELVILLE v. LEESOM. May 8. [324

A defendant taken under a ca. sa. was, on summons, discharged by order of a Judge, with costs, he bringing no action. Held that those costs were interlocutory costs within the meaning of Reg. Gen. Hil. 16 Vict. s. 63.

GRIFFITS, in this Term, obtained a rule to show cause why the plaintiffs should not be at liberty to set off the costs of two orders after mentioned against the judgment recovered in this action.

Pollock, C. B., had made an order in this cause to discharge the defendant from custody under a ca. sa., he bringing no action, and that the plaintiff should pay the taxed costs of that order. He afterwards discharged, with costs, a summons to stay the taxation of these costs.

On a summons to deduct the costs from the judgment, he referred the matter to the Court.

Pigott, Serjt., now showed cause.—To do this would prejudice the lien of the plaintiff's attorney. Reg. Gen. Hil. 16 Vict. s. 63, is that "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against

which the set-off is sought; provided nevertheless that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." (a) In *Scott v. Count de Richebourg*, 11 Com. B. 447 (E. C. L. R. vol. 73). Maule, J., says, that "interlocutory costs" are all the costs the right to which has accrued before the final judgment. [WIGHTMAN, J.—These costs are in a proceeding in the cause, though after judgment. Lord *325] CAMPBELL, C. J.—I should think all *costs in the suit, though not included in the final judgment, interlocutory costs.]

Griffiths was not called upon to support his rule.

Per CURIAM. (b)

Rule absolute.

(a) 1 E. & B. xiii. (E. C. L. R. vol. 72).

(b) Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

END OF EASTER TERM.

The Court of Queen's Bench did not sit in the Vacation following Easter Term.

MEMORANDUM OF EASTER VACATION.

In this Vacation, the following Gentlemen, barristers at law, were called to the degree of the coif.

William Payne, of Gray's Inn, Esquire, who gave rings with the motto *Reverentia Legum*. (Queen's warrant of 11th May, 1858.)

John Cross, of Gray's Inn, Esquire, who gave rings with the motto *In cruce fido*. (Queen's warrant of 17th May, 1858.)

John Tozer, of Lincoln's Inn, Esquire, who gave rings with the motto *Et tenui telas discreverat auro*. (Queen's warrant of 17th May, 1858.)

Charles Petersdorff, of The Inner Temple, Esquire, who gave rings with the motto *Nec mora, nec requies*. (Queen's warrant of 20th May, 1858.)

CASES

ARGUED AND DETERMINED

IN THE

QUEEN'S BENCH,

IN

Trinity Term,

XXI. VICTORIA. 1858.

The Judges who usually sat in Banc in this term, were:

LORD CAMPBELL, C. J.
COLERIDGE, J.

ERLE, J.
CROMPTON, J.

APPLETON BENNETT and CHARLES FREDERICK BENNETT
v. WILLIAM MARSHALL IRELAND. *May 22.*

By agreement between F., the receiver appointed in Chancery for lands and buildings thereon, and J., it was recited that J. had expended money in improving the premises on the understanding that a lease thereof should be granted to him on the terms after-mentioned (pursuant to a previous agreement with parties at that time interested), in consideration whereof F. had consented to enter into this agreement. And it was witnessed that F., in consideration of the premises, and according to his power, agreed with J. to let to him, and J. agreed to take, the land, with the buildings thereon lately converted at J.'s expense into a mill, and other buildings, to hold for twenty-one years at rent payable quarterly. And it was agreed that, when that agreement should have been approved of by the Court of Chancery, or the Master, or if it should be ascertained that such sanction was not necessary, a lease should be executed by F. to J. (and a counterpart by J.), under the terms in the agreement stipulated, which should contain covenants on the part of J. "to pay the said rent in manner before mentioned, damage by fire excepted," and to keep the premises in repair, and to deliver up possession of the premises "and all the present additions," "but not including any buildings not shown" on a plan endorsed, in good repair, "damage by fire excepted." And that, until the lease should be granted, F. might distrain "for all or any part of the rent hereby agreed to be paid." Provided that the agreement should be in all respects subject to the approbation of the Court of Chancery or the Master, F. undertaking to endeavour to obtain such approbation: but, if the approbation were refused the agreement to be void.

J. entered into possession, and erected new buildings.

Held, that J. was tenant from year to year on such terms as would be inserted in a lease pursuing the agreement, so far as they were applicable to a tenancy from year to year.

That, if any part of the premises originally demised were destroyed by fire, the result would be, not to destroy or suspend the whole rent, but to entitle J. to a deduction from the rent according to the proportion which the annual value of the destroyed part bore to the annual value of the whole: taking (dubitante Crompton, J.), the whole to be the premises as originally demised, not as improved by subsequent additions made by J.

FIRST count, for money payable for use of messuages, mills, cottages, &c., lands, &c. Second count, on accounts stated.

*327] *Pleas. 1. Payment into Court of 10*l*. 2. (not now material).

Replication. That the 10*l*. was not enough to satisfy the claim of plaintiffs.

The particulars claimed 31*l*. 10*s*., three quarters' rent, due 24th June, 1856.

On the trial, before Bramwell, B., at the Liverpool Summer Assizes, 1856, it appeared that the premises had been the property of Samuel Barker, deceased, who had devised them; and that, after his death, proceedings in Chancery having taken place, George Ferneley was appointed receiver in May, 1846. In 1848, another receiver was appointed in lieu of George Ferneley: and, in 1853, the present plaintiffs were appointed trustees; and the reversion was conveyed to them by deed of September, 1853.

While Ferneley was receiver, he and the defendant executed an agreement, dated 19th September, 1846, the material parts of which are as follows.

"Memorandum," &c. "Between George Ferneley, of," &c., "of the one part, and William Marshall Ireland, of," &c., "of the other part."

"Whereas the said William Marshall Ireland has expended 350*l*., or thereabouts, in altering and improving the premises hereinafter mentioned, on the faith and understanding that a lease thereof would be granted to him upon the terms hereinafter mentioned, pursuant to *328] *an agreement with Robert Bennett, the trustee and executor of the said G. Ferneley as receiver in the suit *Whitehead v. Bennett*: in consideration whereof the said G. Ferneley hath consented to enter into the agreement hereinafter contained: These presents therefore witness that he, the said G. Ferneley, in consideration of the premises, and according to his power and authority, and so far as he can or lawfully may, hereby agrees with the said W. M. Ireland to let to him, and the said W. M. Ireland hereby agrees with the said G. Ferneley to take from him, all those plots of land situate," &c., "with the buildings thereon (lately converted, at the expense of the said W. M. Ireland, into a cotton weaving mill), with stable and two cottages, particularly delineated and described in the plan thereof hereupon endorsed, together with all rights, privileges, and appurtenances to the premises belonging or appertaining; reserving nevertheless," &c. (right of way, described): "To hold the same premises for the term of twenty-one years, to be computed from the 24th day of June last, at the yearly rent of 42*l*., payable to the receiver or owner for the time being of the said premises, quarterly, on the 25th March, 24th June, 29th September, and 25th December; the next payment thereof to become due on the 29th day of September next. And it is hereby further agreed that, when this agreement shall have been approved of by the High Court of Chancery, or the Master, as hereinafter provided for, or it shall be ascertained that such sanction is not necessary or required, a lease of the said mill and premises shall be forthwith executed by the said G. Ferneley, and all other necessary parties, to the said W. M. Ireland, his executors, admi-

nistrators or *assigns, for the period and under the terms herein stipulated; and a counterpart thereof by the said W. M. Ireland. [*329 And that such lease and counterpart shall contain covenants, on the part of the said W. M. Ireland, his executors, administrators, and assigns, to pay the said rent in manner before mentioned, damage by fire excepted. Also, during the said term, to maintain and keep the said premises in good repair, order, and condition, except the main walls, roofs, principal timbers, and outside of the said buildings. Also to deliver up the possession of the same premises, and all the present additions, alterations, and improvements, to and in the same, but not including any buildings not shown on the said plan, in good order, repair, and condition, damage by fire excepted. Also to permit the receiver and owners for the time being to inspect the said premises twice in every year, with or without workmen and others, and to complete and finish all reasonable repairs and reparations then and there found within three months after notice in writing from such receiver for that purpose. The said lease shall also contain a proviso for re-entry on the said premises in case the said rent shall at any time be in arrear by the space of twenty-one days after the same shall become due, and there shall be no sufficient distress. And it is hereby agreed that, until such lease shall be granted, it shall be lawful for the receiver and owners for the time being of the said premises to distrain for all or any part of the rent hereby agreed to be paid." Ireland to be allowed 100*l.* in consideration of the expense he had been at. "Provided always, that this agreement is and shall be in all respects subject to the approbation of Her Majesty's High Court of Chancery, or the Master appointed by such Court in the aforesaid cause; the said G. Ferneley *hereby undertaking to use his utmost endeavours [*330 to procure such approbation at the earliest practicable period: but, in case the said Court or the said Master shall refuse such application, and shall insist upon such premises being re-let, then this agreement, and every clause herein contained, and every right or claim arising in respect thereof, at law or in equity, shall be void and of no effect."

The defendant entered into possession of the premises mentioned in the agreement, and erected new buildings there. Part of the buildings originally demised consisted of a mill, which was burnt down in October, 1855. The mill had not been rebuilt. The counsel for the defendant contended that, under the agreement, this wholly did away with or suspended the defendant's liability for rent: or, at any rate, that a deduction should be made from the rent, which should bear the same proportion to the whole rent as the annual value of the building destroyed by fire bore to the annual value of the whole property originally demised. The counsel for the plaintiffs contended that the deduction, if any, should bear only the same proportion to the whole rent as the annual value of the building destroyed bore to the annual value of the whole property as improved by the additional buildings which the defendant had erected. The jury found that the annual value of the building destroyed was three-eighths of the annual value of the property originally demised, corresponding therefore to 15*l.* 15*s.* out of the 42*l.* It was agreed that, if only a proportional deduction were allowed, the verdict, on the principle of proportion suggested for the defendant, was to be reduced to 3*l.* 9*s.*; but, on the principle suggested for the plaintiffs, to 9*l.* 10*s.*;

*331] and *that, if no deduction were allowed, the verdict should be for 18*l.* 14*s.* The learned Judge directed the verdict to be entered for the 18*l.* 14*s.*, leave being reserved to move as after mentioned.

In last Hilary Term (the time for moving having been several times enlarged, in consequence of certain proceedings in Chancery), *Knowles*, for the defendant, obtained a rule calling on the plaintiffs to show cause why a verdict should not be entered for the defendant, or a nonsuit, "on the ground that, by the agreement, the payment of rent was to be suspended until the plaintiffs repaired the premises destroyed by fire:" or why the damages should not be reduced to 9*l.* 10*s.*, or 3*l.* 9*s.*, "on the ground that, if the rent was payable at all, defendant was only liable to pay an apportionment; and that, in ascertaining the apportionment, the buildings erected by the defendant after the agreement ought not to have been considered."

Hugh Hill and *Tomlinson* now showed cause.—The defendant contends, in the first place, that the terms under which he held, to be collected from the agreement, are that the rent is not to be paid at all, for any part of the premises, if any be damaged by fire. If the exception, "damage by fire excepted," had not occurred, the tenant would have been liable, in an action for use and occupation, for the whole rent, whatever proportion of the property had been destroyed by fire: *Izon v. Gorton*, 5 New Ca. 501 (E. C. L. R. vol. 35). Here it is not clear that the exception for the case of fire applies at all to the time intermediate

*332] between the occurrence of the fire and the next quarter *day. Further, the agreement is to be in all respects subject to the approbation of the Court of Chancery or the Master. The whole or any part of the rent agreed to be paid may be distrained for until a lease is granted. The terms of the lease would be settled by the Master, who would treat the stipulations in the agreement merely as heads from which the lease was to be framed; and he would bear in mind that the reversion is held in trust. A covenant for insurance by the tenant would be inserted. And, if any abatement were made upon the contingency of fire, it would at any rate be only to the extent of the damage done. The Court of Chancery never would direct the execution of a lease containing a stipulation that, upon the occurrence of any damage by fire, however slight, the whole rent was to cease, the land still remaining, as it would, in the tenant's possession. Probably it would be provided that, if the premises became totally uninhabitable, the whole rent should be suspended. The common form, suspending a proportionate part of the rent upon injury by fire, is given in 4 Bythewood's Selection of Precedents (2d ed., by Jarman) 425, *Leases*, and in Platt's Treatise on Leases, vol. 2, Appendix, p. 693. Then, if the abatement is to be proportionable, what rule of proportion is to be applied? It is found that three-eighths of the value of the premises, as originally let, are destroyed. But the proportion should be taken between the value of the part destroyed and that of the part remaining uninjured and occupied; and this latter includes the value of the new buildings, just as an increase of value by improved cultivation would be taken into account. The whole rent, in law, issues out of every part. The agreement contemplates additions to be made by the tenant.

*333] **Knowles* and *W. R. Cole*, *contra*.—The question must be determined by looking to the particular instrument; no weight

can be attached to precedents in other cases. The party letting is here not an ordinary landlord, but a mere receiver; and it was not to be expected that he should bind himself to repair. On the other hand, the tenant, as the party letting was not bound to repair, would naturally require some stipulation for himself, securing the repair. This was done by suspending the rent during the continuance of damage by fire: by this it became the interest of the lessor to repair: and although the effect would be that the whole rent might be suspended on the occurrence of a trifling damage, yet this would naturally make it more desirable and more easy for the lessor, by a trifling expense, to re-entitle himself to the rent. The note (i) on the passage cited from 4 Bythewood and Jarman's Selection of Precedents 426, shows the way in which parties may seek to secure themselves from a neglect to repair, and the difficulty of fixing a proportion. There is in this agreement the unusual provision for the tenant to deliver up the premises in good repair, "damage by fire excepted." [*Tomlinson*.—It is by no means unusual.] If, however, the abatement is to be only proportional to the damage, it is clear that the smaller sum is that for which the verdict is to be entered up. The calculation of the rent is made, not upon the property as afterwards increased by the defendant's additions, but upon that which was demised to him at the time of the agreement. The lessee was, by the express terms of the agreement, not to be bound to render up in good repair the additional buildings which he should erect.

*Lord CAMPBELL, C. J.—The only real question is, whether the damages are to be reduced to 9*l.* 10*s.* or to 3*l.* 9*s.* There can [*334] be no doubt that the defendant was tenant from year to year, and that he holds on the terms of the agreement, so far as those terms are applicable to a lease from year to year. Now the stipulation which we are to consider is as much applicable to a lease from year to year as to a lease for a term of several years. I think it means that the tenant is to pay the rent named; but that he is to have the advantage of a reduction, from year to year, of the amount accruing from damage by fire. But it would be a very unreasonable construction to say that the whole of the rent was to be suspended for any damage, however small. It is said that the lessor here is only a receiver. That cannot vary the case: he represents the owner. The exception of damage from fire must mean an abatement in respect of such premises as can no longer be applied to the occupation intended by the lessor. The only question therefore is, whether in ascertaining the proportion we are to take in the new buildings. On the whole, I think these must be excluded. They are additional property which the lessee was not bound to keep in repair. The reduction must therefore be to 3*l.* 9*s.*

COLERIDGE, J.—I am of the same opinion. The agreement was to be carried into effect by a lease artificially drawn: till that was done, the tenant would hold on the terms which would be introduced in such a lease so far as they would be applicable to a tenancy from year to year. What then would be the reasonable mode of carrying the agreement into effect? Reasonably the lease would be so framed as to suspend, not the whole *rent, if a partial damage only were done, but a [*335] proportional part. The only question then is as to the rule of proportion. Now, looking at the payment of rent, to the lessee's cove-

nant to repair and give up in good repair at the end of the lease, and to the provision that the buildings to be added by the tenant need not be given up in good repair, I think these are to be cast out of consideration.

ERLE, J.—I am of the same opinion. The tenant is to hold on the terms of a lease which would carry out the agreement. Looking at the few words which raise the question, I think the abatement is to be in proportion to the damage done by fire. As to the buildings added by the tenant, they seem to me to be rather in the condition of property of the tenant, and to be left out of the consideration; and it therefore seems that the proportion is to be estimated on the property as it was at the time of the demise.

CROMPTON, J.—It is conceded in the argument that in some way the rent is to be suspended. The first question is, whether all is to be suspended upon the occurrence of partial damage. If we look at the words only, we find nothing about suspending the rent: the words, if taken literally, would do away with rent altogether. That cannot be the meaning. The fair meaning is, that the tenant is to pay in proportion to what he can occupy. You must put a sensible meaning upon the agreement, and consider how the words would be carried out: and that we may clearly see by the words of the precedent cited from Bythewood and Jarman. As to the other point, I still entertain a *336] doubt whether the *proportion ought not to be estimated with respect to all the premises as in their present condition. My brother Erle suggests that the new building, may be considered as the tenant's property, like tenant's fixtures. That may be so: yet I cannot clearly find it in the agreement. If those additional buildings were destroyed by fire, could the landlord recover the whole rent before they were rebuilt? The language of the agreement as to the repair certainly weakens the argument for the plaintiffs. I can only say I entertain considerable doubt. Rule absolute, to reduce the damages to 3*l.* 9*s.*

PRESTON v. PEEKE. May 22.

In an action between A. and B., it became a question whether damages had been recovered in a previous action against A. by a third party in respect of certain acts. A., to prove the affirmative, produced the record in the previous action, which showed counts on different causes of action, one count only being on the acts now in question. The damages were entered on all the counts, and damages entered generally on all. Evidence was then received that the damages had in fact been given for the matters in the one count only. Held, that such evidence was receivable, as explaining the former record, and not contradicting it.

Although, according to the evidence, it appeared that in the previous action the verdict on one of the other counts ought to have been for the then defendant.

THE first count of the declaration alleged that, in consideration that the plaintiff would, as defendant's agent, and at his request, distrain certain chattels, fixtures, and effects, then being in and on a certain messuage or dwelling-house then in the possession of a tenant of defendant, for an arrear of rent of and for the same, by defendant alleged to be then due and owing to him from the said tenant, the defendant promised plaintiff to indemnify and save harmless plaintiff from all damages, costs, charges, and expenses to be by him sustained by reason

of his so distraining as aforesaid. That plaintiff *accordingly, [*337 in a lawful and proper manner, distrained the said chattels, fixtures, and effects for the aforesaid rent. And that afterwards, by reason thereof, an action was brought against him for so doing; and he was put to divers costs, charges, and expenses therein, to wit, for and in respect of the damages, costs, charges, and expenses recovered against him in such action, being an action brought in one of Her Majesty's Superior Courts against plaintiff on account of the said distress. And all things to entitle plaintiff to such indemnity as aforesaid, and to sustain this action, had before suit happened and existed. Yet defendant hath not in any way indemnified plaintiff: and thereby he hath lost the amount of the said damages, costs, charges, and expenses, amounting (to wit) to 200*l*.

The pleas now material were the following.

3. "That an action was not brought against the said plaintiff, nor was he put to divers costs, charges, and expenses therein, in manner and form as in said first count," &c.

5. "That the said damages, costs, charges, and expenses, in the said first count mentioned, were recovered against the said plaintiff for having broken and entered the said premises, and continued therein for divers days, and severed and cut away a bar counter and fittings, bar and gas fittings, shelves, beer-engines, and other fixtures, of the then plaintiff, then being affixed thereto, and forming part thereof, and carried away the same, and converted the same to his own use, and wrongfully deprived the then plaintiff of the use and possession thereof, and broke to pieces and injured the walls, floors, and other parts of the said premises: and the defendant further saith that the said damages, costs, charges, and *expenses were not recovered for anything that had [*338 been done in a lawful and proper manner by the said plaintiff, under the authority of the said defendant, on account of the said distress: and the defendant further saith that the plaintiff broke and entered the said premises, and continued therein, and cut away the said bar counter and fittings, bar and gas fittings, shelves, beer-engines, and other fixtures of the then plaintiff, and carried away the same, and converted the same to his own use, and wrongfully deprived the then plaintiff of the use and possession thereof, and broke to pieces and injured the walls, floors, and other parts of the said premises, without the knowledge, sanction, or authority of the said defendant.

6. "That the said damages, costs, charges, and expenses, in the said first count mentioned, were recovered against the said plaintiff for having broken and entered the said premises, and continued therein for divers days, and severed and cut away a bar counter and fittings, bar and gas fittings, shelves, beer-engines, and other fixtures of the then plaintiff, then being fixed thereto, and forming part thereof, and carried away the same, and converted the same to his own use, and wrongfully deprived the then plaintiff of the use and possession thereof, and broke to pieces and injured the walls, floors, and other parts of the said premises: and the defendant further saith that the said damages, costs, charges, and expenses were not recovered for anything that had been done in a lawful and proper manner by the said plaintiff under the authority of the said defendant on account of the said distress. And defendant further saith that at the time of the making of the said

promises in the declaration mentioned, and also at the time of the making *339] of the said distress in the declaration mentioned, *the plaintiff well knew that it was wrongful and illegal to break and enter the said premises, and to continue therein, and to cut away the said bar counter and fittings, beer and gas fittings, shelves, beer-engines, and other fixtures of the then plaintiff, and to carry away the same, and to convert the same to his own use, and to deprive the then plaintiff of the use and possession thereof, and to break to pieces and injure the walls, floors, and other parts of the said premises, under or by virtue, or on account, of the said distress."

Issue on these pleas (and other issues not now material).

On the trial, before Erle, J., at the London sittings after Michaelmas Term, 1857, it appeared that the plaintiff had seized certain fixtures, which the defendant had pointed out, and for which seizure plaintiff had contracted to indemnify defendant. To prove the allegations as to the action brought against the plaintiff, plaintiff offered in evidence the record and postea in an action brought in the Exchequer by Wilson, the owner of the premises distrained upon, against the present plaintiff and others. There were three counts in that action. The first count was for breaking and entering the then plaintiff's house, and severing and cutting away certain fixtures there, namely, a bar counter and fittings, bar and gas fittings, shelves, beer-engines, and other fixtures, and carrying away and converting them and injuring the walls, floors, &c. The second count was for a wrongful sale of the goods distrained, without giving a statutable notice, for selling them for less than the best price, and for neglecting to give a copy of charges. The third count was for distraining when no rent was in arrear. The entry on the postea was *340] for *the plaintiff on all the counts, with damages for 65*l.*, entered generally, and costs. At the close of the present plaintiff's case, Erle, J., inquired as to the circumstances under which the previous verdict was found: when a witness, Terry, who was managing clerk to the attorney in the previous action, stated that Martin, B., who tried that action, expressed an opinion that there was no right to seize certain of the fixtures mentioned in the first count; that, as to the second count, it was useless to proceed with it, as there could only be nominal damages upon it; and that there was no evidence as to the third count. The counsel on both sides concurred in requesting Martin, B., to fix the damages: and he accordingly named 65*l.* as the value of the fixtures which he considered to be illegally seized. The witness added that, strictly speaking, the entry of the verdict should have been for the plaintiff on the first and second counts, with damages 65*l.* on the first count, and 1*s.* on the second, and for the defendant on the third count. Erle, J., left this evidence to the jury; who found a verdict for the plaintiff for 150*l.* damages.

In last Hilary Term,

Edward James obtained a rule calling on the plaintiff to show cause why a new trial should not be had, "on the ground of improper reception of evidence, for the purpose of showing that the postea on the *Nisi Prius* record in *Wilson v. Preston and Others* was improperly entered." (He also moved on the ground that the judgment roll should have been produced: but on this no rule was granted.)

Cleasby now showed cause.—The objection appears to be that the

parol evidence received contradicted the *record in *Wilson v. Preston*. But it does not so: it is perfectly consistent with that [*341 record, which it explains; and to this there is no legal objection. The evidence of Terry was given for the purpose of showing what the subject-matter of the claim was in respect of which the verdict was found: a point upon which the record, looked at by itself, gives no information. In *Seddon v. Tutop*, 6 T. R. 607, an action was brought on a promissory note and for goods sold: the defendant suffered judgment by default: and the plaintiff, on the execution of the writ of inquiry, gave evidence only as to the promissory note, and took damages for that only. He afterwards sued for the goods sold; and it was held that, upon showing the above facts, he was entitled to the verdict on a plea of judgment recovered in respect of the cause of action declared for in the second suit. It is true that the witness here stated that the verdict in the former case was inaccurately entered: that, however, was no part of the case of the present plaintiff, who does not rely upon any real or supposed inaccuracy in the former record. On moving, *Read v. Jackson*, 1 East 355, was relied upon. There the evidence rejected was brought for the purpose of showing that the former verdict was inaccurately entered: and so, no doubt, if it had been part of the present plaintiff's case that the former verdict was inaccurately entered, the evidence offered would not have been receivable: but that is not so.

Edward James and Stammers, contra.—The indemnification was of course only in respect of lawful acts of the plaintiff: it became therefore a question, in this *action, whether the previous verdict had [*342 been recovered in respect of lawful acts. Now the record showed a recovery partly in respect of unlawful acts. [ERLE, J.—The indemnity was shown to have been given in respect of seizing particular articles.] It appears by the previous record that the present plaintiff wrongfully sold the goods seized without notice. That was complained of by the second count. There was a distinct complaint in the third count. [CROMPTON, J.—We must suppose that some damages were given in respect of each count: the question is, how much for each?] In 3 Starkie's Evidence 768 (3d ed.), the rule is thus laid down: "The principle on which evidence is received to explain mistakes in matters of contract between private persons, does not extend to the admission of evidence to show that a mistake or alteration has been made in records: those memorials having been made and kept under the immediate authority of the law, and by officers in whom confidence is for that purpose reposed, it is to be concluded that they have been correctly made, and faithfully preserved." Now here, in effect, the object of the evidence was to show that the damages were given exclusively on the first count. [Lord CAMPBELL, C. J.—The question is, whether the evidence was admissible. That cannot depend upon the answer which the witness gave to the questions asked.] The proper course for the plaintiff was to get the postea amended from the notes of the Judge who tried the case. In *Ramsbottom v. Buckhurst*, 2 M. & S. 565, 567 (E. C. L. R. vol. 28), Lord Ellenborough said: "The judgment roll imports incontrovertible verity as to all the proceedings which it sets forth." *Rex v. Carlisle*, 2 B. & Ad. 362 (E. C. L. R. vol. 22), is a strong *instance of the application of this rule. *Read v. Jackson*, 1 East 355, has not been distinguished. The prin- [*343

ciple of that decision was that the evidence tendered went to impeach the authenticity of the record, by showing that no evidence was given on a particular issue: and it can make no difference that, in the present case, there are two counts upon which the verdict is entered generally.

· Lord CAMPBELL, C. J.—I think the evidence was properly admitted. It is true that there can be no averment against a record: but I do not find that this has been attempted in the present case. The evidence given was, not to contradict the record, but to explain it. The declaration is on a guarantee given by the defendant to hold the plaintiff harmless on his distraining certain fixtures: and it avers that an action has been brought against the plaintiff for distraining those fixtures, and that damages have been given in that action. In proof of this, the record in that action is offered in evidence; upon which it appears that the declaration in that action contained three counts: the first, for entering the then plaintiff's house, distraining fixtures, and injuring the walls; the second, for selling goods distrained wrongfully, and without due notice, for less than the best price, and neglecting to give a copy of the charges, &c.; and the third, for distraining when no rent was due. Now the present plaintiff had to prove that the damages were in fact given for the distress upon the fixtures: and he calls a witness to show that the evidence of the substantial damages was really given as to that. That *344] indeed was only parol evidence: but *I think it was admissible. What was done was much like what is done in the case where you produce evidence of a declaration in debt, and show, as you may, in respect of what the damages were given. You may show in the same way, here, that the 65*l.* damages were given in respect of the distress for the fixtures. That is not showing that the officer has committed any inaccuracy in the entry which he made on the *postea*, but is perfectly consistent with it. It shows that the count for fixtures is that upon which the 65*l.* damages were given. That is not contradicting the record; for what is proved is consistent with what appears. The jury were not bound, in the present action, to find for the full amount of the 65*l.*: but they were justified in coming to the conclusion that the damages in the former action were awarded in respect of the fixtures, and that the plaintiff was entitled to the benefit of the indemnity.

COLERIDGE, J.—I am entirely of the same opinion, although I quite agree that a record is not to be contradicted. We have not to inquire now upon any question except that whether the evidence was receivable. It was received only for the purpose of explaining the record, with which it was quite consistent. What does the record import? If it necessarily imports that the damages were jointly given on all the counts, the objection would be good. But I never understood that this was the import of such a record, or that the record meant more than that there was a cause of action in each count and some damage recoverable on each. If so, the evidence here only went to show how much was recovered on each. As to that the record was silent; and it *345] would be shown by evidence only: and, when it *is shown, the record is not contradicted. Thus the only substantial damage was given in respect to the first count: and you may consider that (say) a farthing damages were given on each of the other counts. It would be quite otherwise if, in the first action, the jury had given 10*l.* damages

on one count and 20*l.* on another: evidence could not then have been given to show that the damages were to be otherwise apportioned.

ERLE, J.—I also am of opinion that this evidence was admissible, and that this does not contradict the record. There is no attempt to show that the finding or the entry of the *postea* in the first action was wrong. The law requires that the *postea* should dispose of all the issues, and should show the damages: here the damages are blended together, and there is a general judgment for damages and costs. But this is not contradicted by evidence showing how much damage was proved on each count. If the jury had found 10*l.* upon one count and 30*l.* upon another, and the officer had entered damages for 40*l.* generally, evidence might have been given to show what was really done. That in fact is what has taken place. There they put the judge in the place of the jury; and he, in substance, gave 65*l.* damages on one count, and nominal damages on the other.

(CROMPTON, J., had left the Court.)

Rule discharged.

***HEMMINGS v. GASSON. May 24.**

[*346

Under sect. 61 of the Common Law Procedure Act, 1852, and forms 32, 33, in Schedule (B) to that Act, the declaration in an action for libel or slander need not state any colloquium, but may set out the words complained of, and put any construction upon them by innuendo. Whether the words were spoken with such meaning is for the jury.

When the libel or slander is, *prima facie*, a privileged communication, it is open to the plaintiff to put in evidence statements made by the defendant subsequently to the libel, as tending to show malice in the defendant at the time of publication of such libel. The Judge ought, especially if there be a considerable interval between such statements and the publication, to direct the jury to consider whether such subsequent statements might not refer to something which happened subsequently to the libel, so as not to show malice in the defendant at the time of the publication of the libel charged.

ACTION for libel and slander. The first count of the declaration stated that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say: "What do you think of my job? I am satisfied who it was got into my shop, as George Hearmon tells me that he met Hemmings" (meaning the plaintiff) "and his son about four o'clock the morning my shop was broken into: I found part of a letter on the floor of my shop, which was in the handwriting of Hemmings." Meaning, by the false and malicious words aforesaid, that the plaintiff had forcibly and with a strong hand broken and entered the defendant's shop, and had wilfully and maliciously, and within three calendar months then last past, cut, damaged, and destroyed the defendant's property in the said shop, to wit, household furniture of the defendant, contrary to the statute in such case provided, and had committed criminal offences punishable by law.

The second count stated that the defendant heretofore, to wit, on, &c., falsely and maliciously wrote and published of the plaintiff the false and malicious libel, of and concerning the plaintiff, following, that is to say.

"To the Editor of The Rye Chronicle.

"Rye, April 9th, 1857.

"Sir, In your last number I am accused, by George *Hem-
mings, of having circulated a report charging him with damaging [*347

my property. I will ask any one who I could judge more than him, he having said he would be revenged on me, because I prevented him and his father from taking 80*l.* belonging to the late Mr. Ashton. I have several other matters all tending to substantiate my opinion in this matter. I will state but one: I have the handwriting, which I believe to be his father's, James Hemmings" (meaning the plaintiff), "which was found on the premises on the morning the diabolical act was committed: and I am not alone in this belief; for, with one or two exceptions, all who have seen the writing are of the same opinion. I could offer a more lengthened statement of this vile transaction; but I have been advised not to do so, as it may defeat the ends of justice. (Signed) JAMES HENRY GASSON." Meaning, by the said libel, that the plaintiff had, together with the said George Hemmings, wilfully and maliciously cut and damaged and destroyed certain household furniture of the defendant. And by means of the premises the plaintiff's character and reputation has been much injured.

Plea, Not guilty. Issue thereon.

At the trial, before Erle, J., at the Sittings in last Hilary Term, at Westminster, evidence was given in support of both counts of the declaration. It appeared that the letter which contained the libel charged in the second count was written in answer to one written by the son of the plaintiff to the Rye Chronicle on 2d April, 1857. In support of that count, in order to prove malice, a witness, J. Burgess, was called, who swore that, on the Saturday before the trial, he had heard the defendant speak of the plaintiff at a public-house, called The Albion, *348] at Rye; that the defendant *then said that the plaintiff was a dishonourable man; that he had drawn and dishonoured bills; and that he (the defendant) knew him to be a rascal. This evidence was objected to, but was admitted, as the learned Judge held (on grounds not now material) that the libel was a privileged communication, and that therefore the evidence was admissible to prove malice in the defendant.

The jury returned a verdict for the plaintiff: damages on the first count, 40*l.*; damages on the second count, 60*l.*

Ballantine, Serjt., in last Hilary Term, obtained a rule to show cause why the judgment should not be arrested, on the ground that the innuendoes in both counts were unsupported by the words and writing; or a new trial not to be had, on the ground that the evidence of Burgess was improperly admitted.

Parry, Serjt., and *A. Wills* now showed cause.(a)—First, as to the count for libel. It is contended by the other side that that count is bad, in arrest of judgment, inasmuch as there is no colloquium. But that is no longer necessary. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61, enacts that "in actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, *349] with *or without the alleged meaning, show a cause of action, the declaration shall be sufficient." And form 32, in Schedule

(a) Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, J.

(B.), gives the mode of framing the declaration. [CROMPTON, J.—Form 33 is more to the purpose here: form 32 does not require any innuendo.] It is clear, from the Act, and from those forms, that no colloquium is now necessary in a count for libel: and the plaintiff here has complied with sect. 61, by averring that the defendant “falsely and maliciously” spoke, and wrote, and published, &c., that is, published in a defamatory sense. The innuendoes are also sufficient within the Act; and it was a proper question for the jury whether such innuendoes were proved.

Next, as to the objection to the reception of Burgess's evidence, respecting the defendant's conduct subsequent to the libel. Such evidence was admissible to prove the malice of the letter containing the libel, if that letter was a privileged communication, as the learned Judge held it to be at the trial: *Simpson v. Robinson*, 12 Q. B. 511 (E. C. L. R. vol. 64). In *Wright v. Woodgate*, 2 C. M. & R. 573,† Parke, B., in giving judgment, laid down that, when the alleged libel was a privileged communication, malice might be proved either from the language of the libel itself, or by extrinsic evidence of the conduct or expressions of the defendant, showing that he was actuated by malice. In the present case there was evidence of both kinds: first, from the letter itself, which, though professing to be merely an answer to that written by the plaintiff's son, introduces several fresh charges against the plaintiff; secondly, from Burgess's account of the defendant's subsequent conduct. [COLERIDGE, J.—I do not suppose that there is any doubt that extrinsic *evidence of malice may be admissible: but [*350 there may be a question whether the particular evidence relied on be not too remote.] If the conduct or expressions are connected with the subject-matter of the libel, they are admissible in evidence; that is the real test. *Finnerty v. Tipper*, 2 Campb. 72, may be relied on by the defendant. But in that case the part of the evidence which was rejected was rejected on the ground that it did not refer to the libel charged, but was a new and substantive libel in itself. The case is referred to, and the judgment commented upon, in *Starkie on Libel*, vol. 2, p. 54 (2d ed.). In *Rustell v. Macquister*,(a) Lord Ellenborough admitted evidence of slanderous words spoken by the defendant subsequently to the slander, tending to show *quo animo* he spoke the slander charged.

Ballantine, Serjt., and *Honyman*, in support of the rule.—[Lord CAMPBELL, C. J.—We are against you on the point in arrest of judgment. CROMPTON, J.—The Act and the schedule, taken together, seem to allow the innuendo to take the place of the colloquium.] The contention of the defendant is that, even if there be no necessity for a colloquium, the words charged are not susceptible of the meanings assigned to them by the innuendo in the understanding of the persons in whose hearing they were spoken. And that is a question for the Judge: *Blagg v. Sturt*, 10 Q. B. 899 (E. C. L. R. vol. 59).

Next, as to the admissibility of the evidence. The question to be decided was, whether there was malice at the time of uttering the particular words set out in the declaration. Burgess's evidence was quite irrelevant *to that issue; and in no case have subsequent expressions by the defendant been admitted to prove malice, except [*351 where such subsequent expressions or conduct were directly relevant to

(a) Note to *Thompson v. Bernard*, 1 Campb. 49.

the subject-matter of the slander or libel complained of. The rule is clearly laid down, in *Finnerty v. Tipper*, by Sir James Mansfield. [Lord CAMPBELL, C. J.—Here the plaintiff contends that, the slander charged being *primâ facie* a privileged communication, the evidence in question is admissible to show express malice. In *Finnerty v. Tipper*, there was not a privileged communication.] In *Pearson v. Lemaitre*, 5 M. & G. 700 (E. C. L. R. vol. 44), the Court evidently recognises the necessity of relevancy in either case. The object of the evidence in either case is to show malice: to show its existence, if the communication be *primâ facie* privileged; if it be not, to show the amount of malice. In *MacLeod v. Wakley*, 3 C. & P. 311 (E. C. L. R. vol. 12), *Camfield v. Bird*, 3 C. & K. 56, and *Barwell v. Adkins*, 1 M. & G. 807 (E. C. L. B. vol. 39), there was direct relevancy. In *Rustell v. Macquister*, 1 Campb. 49 (note), the report does not set out the words; so that it does not appear whether they were relevant or not. [Lord CAMPBELL, C. J.—In *Simpson v. Robinson*, 12 Q. B. 511 (E. C. L. R. vol. 64), the evidence was not relevant to the slander charged.] There the expressions were antecedent to the alleged slander. [CROMPTON, J.—That was so in *Barrett v. Long*, 3 H. L. Ca. 395.] In any case the expressions must be strictly relevant. The authorities are collected in *Taylor on Evidence*, vol. i. sect. 318, p. 317 (3d ed. 1858).

*352] Lord CAMPBELL, C. J.—Upon the second point the *Court will take time to consider. Upon the first point, in arrest of judgment, we are all agreed that sect. 61 of The Common Law Procedure Act, 1852, and the two forms in Schedule (B.) to that Act, enable the pleader to put any construction he pleases upon the words complained of, by innuendo; and that it is for the jury to say whether the words were spoken with such meaning. *Cur. adv. vult.*

Lord CAMPBELL, C. J., on a later day in this Term (May 28th), delivered the judgment of the Court.

We are of opinion that the rule for a new trial must be made absolute. We do not say that the evidence of Burgess was inadmissible: the slander charged was *primâ facie* a privileged communication; so that it was necessary to show express malice. But we think that the learned Judge should have pointed out more distinctly to the jury the length of time between the writing of the letter charged in the declaration and the subsequent expressions sought to be put in evidence, and have suggested to the jury that they must take into consideration the possibility that such expressions might have referred to something which had happened after the libel. The jury might have come to that conclusion, and have been of opinion that, *at the time when the libel was published*, the defendant was not actuated by malice. There will therefore be a new trial: the costs to abide the event.

Rule absolute for new trial.

The admissibility in an action for libel or slander, of evidence of other libellous or malicious words or writings not counted on in the declaration, has been the subject of considerable diversity of opinion in this country as well as in Eng- land. It may be taken as generally agreed that where from the course of the defence it is necessary or proper to show express malice, evidence of antecedent or subsequent words, whether spoken before or after suit brought, not action-

able in themselves, or which are mere repetitions of the slanderous words charged in the declaration, will be admissible to show the intention with which the words counted on were used: *Shock v. M'Chesney*, 2 Yeates 473; *M'Alment v. M'Clelland*, 14 Serg. & R. 361; *Elliot v. Boyles*, 7 Casey Penn. 65; *Bodwell v. Swan*, 3 Pick. 378; *Thomas v. Croswell*, 7 Johns. 270; *Root v. Lowndes*, 6 Hill N. Y. 518; *Watson v. Moore*, 2 Cush. 137; *Lanter v. M'Ewen*, 8 Blackf. 497; *Fabers v. Myers*, Id. 14; *Burson v. Edwards*, Id. 164; *Boteler v. Bell*, 1 Maryl. 178; *Ware v. Cartledge*, 24 Alab. 627; *Teague v. Williams*, 7 Alab. 844; *David v. Griffith*, 2 Harr. & Gill 70; *Randall v. Holsenbake*, 3 Hill S. C. 175; *Kennedy v. Gifford*, 19 Wendell 296; *Miller v. Kerr*, 2 M'Cord 285; *Williams v. Harris*, 3 Missouri 412; *True v. Plumley*, 36 Maine 479; *Williams v. Miner*, 18 Conn. 472. So of actionable words, barred by the statute of limitations: *Randall v. Holsenbake*, 3 Hill S. C. 175; see in New York, *Root v. Lowndes*, 6 Hill 518; *Morgan v. Livingston*, 2 Richardson 584. In some of the cases evidence of distinct and independent libellous writings or slanderous words, though actionable in themselves, have been held admissible for the same purpose where relating to the same subject-matter or the same on a similar charge: *Shock v. M'Chesney*, 2 Yeates 473; *Wallis v. Mease*, 3 Binney 549; *Keene v. M'Laughlin*, 2 Serg. & R. 449; *White v. Sayward*, 33 Maine 322; *William v. Miner*, 18 Conn. 472; *Stearns v. Cox*, 17 Ohio 592; *Van Derveer v. Sutphen*, 5 Ohio N. S. 293; *Scott v. M'Kinnish*, 15 Alab. 666. But in all such cases, as well as those

where the evidence is of a repetition of the original slander, it is held that the jury must be carefully cautioned not to give any damages for the words or libels thus given in evidence: *Wallis v. Mease*, 3 Binney 549; *Lanter v. M'Ewen*, 8 Blackford 497; *Tone v. Plumley*, 36 Maine 479; *Williams v. Miner*, 18 Conn. 472; *Teague v. Williams*, 7 Alab. 844; *Van Derveer v. Sutphen*, 5 Ohio N. S. 293; *Letton v. Young*, 2 Metcalfe (Ky.) 558; though see *Williams v. Harris*, 3 Missouri 412, where the evidence seems to have been admitted in aggravation of damages.

On the other hand, such evidence has been held in New York not to be admissible even to show malice, on the ground that if admitted it would not be possible to prevent the jury from giving damages in respect thereto: *Randall v. Butler*, 7 Barb. 261; *Keenholt v. Beeker*, 3 Denio 346; *Root v. Lowndes*, 6 Hill 518; *Howard v. Sexton*, 4 Comst. 161; see *Campbell v. Butts*, 3 Comst. 175. Where, however, the evidence offered is of other libels or slanders, involving separate and independent charges, or not on the same subject as that in the declaration, the authorities agree that it must be rejected: *Eckart v. Wilson*, 10 Serg. & R. 53; *Thomas v. Croswell*, 7 Johns. 270; *Bodwell v. Swan*, 3 Pick. 378; *Watson v. Moore*, 2 Cush. 137; *Mix v. Woodward*, 12 Conn. 264; *Howard v. Sexton*, 4 Comst. 161.

Where evidence of repetitions of a slander, or of distinct actionable words or libels, is admitted in one action, it is no bar to a subsequent action upon the words or libels so given in evidence: *Campbell v. Butts*, 3 Comst. 175; *Tone v. Plumley*, 36 Maine 479.

*353] *The BRITISH EMPIRE Shipping Company, Limited, v. JOSEPH SOMES, FREDERICK SOMES, and SAMUEL FRANCIS SOMES. *May 26.*

Shipwrights contracted with the owners of a ship to do repairs on the ship in the shipwright's graving dock; in the contract a provision was made that a lump sum should be paid for the use of the dock, the other charges being on a quantum meruit.

The ship was repaired in the dock; and the owners were not prepared to pay the price. The shipwrights gave notice that they should detain the ship and claim 21*l.* a day for the use of the dock during the detention. The shipowners finally paid the amount claimed, together with the sum claimed for the dock-rent, under protest.

Held by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the shipwrights had no lien for the use of the dock during the detention.

ACTION for money had and received. Before plea, Erle, J., under the powers given by The Common Law Procedure Act, 1854, ordered that the matters in the cause should be referred to an arbitrator named by the parties, and that a case should be stated as to the allowance or disallowance of the item after mentioned. A case was stated accordingly, of which the material parts were as follows:

The plaintiffs are a registered company, with limited liability, and are owners of a vessel of the burthen of upwards of 3000 tons, called The British Empire. The defendants, who constitute the firm of Somes, Brothers, are shipwrights on a large scale, having a dock and ship-yard at Blackwall. The defendants' dock and ship-yard belong exclusively to the defendants, and are their own private property. Joseph Wilson, of Liverpool, was, during the transactions after mentioned, ship's-husband for the plaintiffs, and acted as such for them. Frederick Preston was, during the same period, the master shipwright of the defendants at their dock at Blackwall, and acted as such for them. In the early *354] part of 1856 a survey had *been, at the instance of the plaintiffs, by certain surveyors employed by them, held on the plaintiffs' ship, The British Empire, and extensive repairs ordered; and Mr. Wilson had applied to Somes, Brothers, for an estimate of the costs of the repairs ordered, which, in the letter of 16th August hereafter set out, are referred to as "the repairs" "according to the estimate made for damage." The case then set out letters between the parties, of which the following extracts formed the material parts. Preston to Wilson. London, 16th August, 1856. "I have sent you a specification for the repairs of The British Empire, according to the estimate made for damage, which amounts to 4296*l.* 13*s.* 5*d.*, less 7½ per cent., nett." "I am certain it must be all guesswork and lumped at, if the work you named extra is estimated; for I have no wish to get into an error myself; and I can assure you I have no wish whatever to lead the owners into any. I am positive, if the whole were done without any estimate, it would be quite as reasonably done as with one; and the very first week after the vessel was began the estimating would be found entirely useless." Wilson to Somes, Brothers. "Liverpool, 22d August, 1856. Gentlemen, Your calculations to repair the ship British Empire, and Mr. Preston's letter dated 16th, have been duly laid before the directors, when the suggestion of Mr. Preston not to repair the ship by contract was duly considered; they now request me to ascertain at what price you would furnish the materials we should require to complete the

repairs, viz.: pitch pine, yellow pine, American elm, per cubic feet; oakum and pitch, per hundredweight; iron work, say bolts, knees, straps, &c., per pound and hundredweight; graving dock charges; when you can take her *in; depth of water next week. Your reply, in course of post, will oblige." Preston to Wilson. "London, 25th [355 August, 1856. Sir, Your letter directed to Messrs. Somes I did not see until this morning, being in the City on Saturday. I beg to hand you Messrs. Somes' prices as you wish." Then followed a list of the prices of materials in detail. "The cost of use of graving dock for the job will be from 120 to 150 guineas; can dock the vessel three or four days after notice; can dock her at any neap tide in our large dock. The above prices subject to 7½ per cent. for cash, except dock dues. I am quite certain that it would be far the better way for the company not to make a special contract, it must be full of alterations, whoever made it, so soon as the work was put into execution." Wilson to Preston. "Liverpool, 26th August, 1856. I beg to acknowledge receipt of your favour of yesterday, quoting prices for timber, &c., to which I replied, per telegraph, that the company had decided to accept them." The case then proceeded. The ship was accordingly taken into the defendants' dock at Blackwall on the 1st day of September, and extensive repairs were done by the defendants on the ship by the plaintiffs' orders. In the latter part of October, 1856, the work was nearly completed. The plaintiffs, in the early part of November, 1856, employed Messrs. Cotterill & Sons as solicitors for the plaintiffs; and they from this time acted as such solicitors for the plaintiffs throughout the rest of the transaction. The defendants employed Mr. Saxton as their solicitor; and he acted as such for the defendants throughout the rest of the transaction. The case then set out a correspondence, and contained statements showing, in substance, that the plaintiffs were not prepared to pay the demand *of the defendants in ready money, [356 and that there were negotiations going on for an arrangement to give them a security over the ship. The following extracts from the correspondence are the material parts. Wilson to Somes, Brothers. "14th November, 1856. Since our last negotiation with you for the payment of your bill for the repairs of the ship *British Empire*, we have not been able to raise the amount required on such terms as would be satisfactory to the several parties interested in this vessel. We submit for your consideration, that you allow the vessel to leave your dock and put her in the Victoria Dock, you keeping possession of the vessel, besides our giving you (along with the directors) any or all possible security on the ship that your claim shall be paid before she goes to sea. In the present state of the money market we possibly would not be in a position to pay you for fourteen days, or perhaps longer: all that we ask of you is time, and by keeping the ship in your dock will not facilitate our getting the needful. If you can meet us in any way to facilitate the settlement of your account we shall feel obliged." Somes, Brothers, to Wilson. "London, November 15th, 1856. Sir, We are favoured with your letter of yesterday, and, in reply, beg to say that we have had an interview with Mr. Saxton upon the subject, the result of which is that, before *The British Empire* leaves our dock, unless cash is paid, we should require to have a duly registered mortgage executed upon her, giving us immediate power of sale. We should then be willing to let her be taken

into the Victoria Docks as you desire. Mr. Saxton assures us that nothing short of this would give us any security after parting with the vessel. It therefore now rests with yourself and the company either to pay us in cash, or to execute a mortgage as above specified: *357] *and we wait your decision. The whole work is now well nigh completed; and the ship is occupying our dock to no purpose: we must therefore beg the favour of an early settlement, whichever way it may be done. We have been expecting to receive back our accounts that we may get them completed." Somes, Brothers, to Wilson. "London, November 25th, 1856. We are much surprised that we have heard nothing further from you as to settlement of our account for British Empire; and, if some arrangement be not come to at once, we shall be compelled to take further steps in the matter. We also give you notice that we shall charge the owners of the ship 21*l.* per diem for the hire of our dry dock from the time our account was delivered, viz., the 20th instant." Cotterill & Sons to Saxton. "November 27th, 1856. Ship British Empire. The British Empire Shipping Company (Limited) have sent us Messrs. Somes' letter of the 28th inst., with notice of Messrs. Somes' intention to charge 21*l.* per day for the occupation of their dock. We of course dispute Messrs. Somes' right to make any such claim; and we are instructed by the company to, and hereby, give Messrs. Somes, through you, notice that the company hold Messrs. Somes responsible for all damages consequent upon the detention of the ship." The letter then proposed a reference as to the amount, which was declined. Cotterill & Sons to Somes, Brothers. "December 18th, 1856. Gentlemen, On behalf of The British Empire Shipping Company (Limited) we hereby give you notice, with reference to your claim for repairs done upon and to the ship British Empire, and your refusal to deliver up the said ship, that we, on behalf of the said company, are *358] prepared to pay you whatever sum you demand, under protest, *and for the sole purpose of obtaining delivery and possession of the said ship; and that the said company will take such steps as they may be advised to recover repayment of such sum as may be so paid, or any part thereof, as also such damages as the said company may have sustained, or may hereafter sustain, by reason of your retention of and refusal to deliver up the said ship. Awaiting to hear from you, when you will be prepared to deliver up the said ship, and the amount you claim." The accounts were accordingly sent in. The case proceeded. In these accounts is contained the following item: "Dock dues, 27th November to 29th December, 27 days at 21*l.*, 567*l.*;" which forms part of the total, viz., 9515*l.* 8*s.* 4*d.* The sum of 8816*l.* 15*s.* 2*d.*, being the sum of 9515*l.* 8*s.* 4*d.*, the amount of the plaintiffs' claim less the sum of 698*l.* 13*s.* 2*d.* discount, was, on the 22d day of December, 1856, paid by Messrs. Cotterill & Sons on account of the plaintiffs to the defendants under protest. The ship was, on the 24th December, given up to the plaintiffs by the defendants.

The present action was brought for money had and received, to recover back so much of the said sum of 8816*l.* 15*s.* 2*d.* as was in excess of the sum for which the defendants had a right to detain the ship; the plaintiffs contending that the defendants' charge for the work was excessive, and that they had no right to detain the ship for anything, but what was due on a quantum meruit for work, labour, and

materials. By order of Mr. Justice Erle this case is stated, as to the allowance or disallowance of the item of 567*l.* claimed in the account for the occupation of the defendants' dock from 27th November to 24th December, during which period the ship was detained under the [*359 *defendants' claim of lien. The plaintiffs contend that the defendants had no right to detain the ship for any expense incurred or inconvenience sustained by the defendants when enforcing their lien under the circumstances described; and that what was paid in respect of this item, to obtain possession of the ship, was money extorted from them by the defendants. And they further contend that, even if the defendants were entitled to detain the ship for something in respect of this item, 21*l.* a day was excessive in amount. Nevertheless, for the purpose of this case, and for such purpose only, it is to be assumed that the sum of 21*l.* per day was a reasonable charge. The Court is to have power to draw all such inferences of fact as to it seems fit.

The question for the opinion of the Court is, Whether the defendants are entitled to retain the sum paid to them in respect of this item of 567*l.* on the above assumption.

If the Court shall be of opinion that they are not so entitled, the plaintiffs are to have judgment for 524*l.* 9*s.* 6*d.* (being 567*l.* after deducting a proportionate part of the discount for cash allowed in the account), without prejudice to the plaintiffs making a claim for damages in respect of interest before the arbitrator, with costs of this case.

If the Court shall be of opinion that the defendants are so entitled, the defendants are to be entitled to the costs of this case; and it is to be referred to the same arbitrator to decide the amounts that defendants are entitled to retain in respect of this item.

The case was argued in Easter Term, 1858.(a)

**Blackburn*, for the plaintiffs.—There is nothing stated in the case to give any lien, beyond that which the law confers on a [*360 party who has done work on a chattel so as to improve it. That lien the defendants no doubt had: and the question is, whether the defendants have a further lien for the charges they have incurred whilst detaining the ship under this undoubted lien. [*T. Jones* (of the Northern Circuit), for the defendants, having stated that he should contend that there was a contract to pay for the use of the dock whilst the ship was detained, *Blackburn* was stopped by the Court; and *T. Jones* was called upon to show the contract.]

T. Jones, for the defendants.—In the letters forming the contract under which the ship was repaired there is a specific charge for the use of the dock; that shows that, so long as the defendants' dock was occupied by the plaintiffs' ship, the plaintiffs were to pay for it. And, wherever a lien is given to a bailee, by necessary implication there is a right given to charge the bailor for the keep of the article. If it were otherwise, a lien would often be very prejudicial. Is the trainer of a race-horse, who has a lien, to keep the animal at his own cost whilst he detains? That case is exactly analogous to the present. It may be said that the defendants could not have sued for the use of their dock during this time: perhaps they could not have sued in contract; but they might have sued in tort for not taking away the ship.

Blackburn, in reply.—The charge for the use of the graving dock

(a) On Tuesday, May 4th. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, J.
R., B. & R.—14

during the repairs, it is admitted, forms part of the amount due for work, labour, and materials, for which the shipwrights had a lien. It is a special *361] charge for the use of an expensive tool, not a rent for a place of deposit. And there was no need to keep the ship in the graving dock after the repairs were done; the lien of the shipwrights would have been as effectually preserved by keeping a shipkeeper aboard, so as to keep possession after the ship was floated. [ERLE, J.—If they had done so, the same question would have arisen. Would the ship-owners have been liable for the expense of the shipkeeper? It would have been impossible then to contend that the specific mention originally of a charge for the graving dock had any bearing on the real question, which is, whether the owner of a chattel is liable to one having a specific lien on it for the costs of enforcing that lien. It is necessary to distinguish between a lien created by contract express or implied and a specific lien given by law. A bailee has, by law, a lien for his skill and labour expended on a chattel bailed to him for that purpose. He has not, by law, a lien for any other charge; not for feeding, keeping, and taking care of an animal delivered to him for that purpose; *Judson v. Etheridge*, 1 C. & M. 743;† nor for agisting cattle; *Jackson v. Cummins*, 5 M. & W. 342.† The specific lien thus given is so far from being derived from contract that, as is pointed out by Parke, B., in delivering judgment in *Scarfe v. Morgan*, 4 M. & W. 270, 283,† “prior to the case of *Chase v. Westmore*, 5 M. & S. 180, the general opinion had been that there could be no lien where there was any express contract at all. That case, however, decided, that where there was an express contract, but containing no stipulation inconsistent with the lien, it might still exist.” If to this lien, given by law, the law had attached, as an incident, *362] that the bailor was to make good the expense of enforcing the lien, there would surely be found some authority to show that such an incident was annexed: but there is none. In *Franklin v. Hosier*, 4 B. & Ald. 341 (E. C. L. R. vol. 6), the lien of a shipwright was established; but no claim was there made for the cost of keeping the ship. In *Scarfe v. Morgan*, 4 M. & W. 270,† (a) a doubt was expressed by the Court of Exchequer whether a lien at common law could exist on a live animal, because the law had not provided who was to feed it. The obvious answer to that doubt would have been that it was to be kept at the expense of the bailor by the bailee if such had been the law; but the very learned counsel who argued gave a different answer, which is approved of in the considered judgment of the Court. “It occurred to us in the course of the discussion, which was very ably conducted on both sides, that there was a difficulty arising out of the circumstance, that this being a living chattel, might be expensive to the detainer, and that the allowance of such a lien would raise questions as to who was liable to feed it intermediately. But Mr. Byles answered this difficulty satisfactorily, by referring us to the analogous case of a distress kept in a pound covert, where he who distrains is compellable to take reasonable care of the chattel distrained, whether living or inanimate, and to the case of a lien upon corn, which requires some labour and expense in the proper custody of it. Other cases were cited in the argument, but they were cases of general lien, which clearly turn upon contract or usage of trade, in which he who seeks to establish such contract or usage ultra

the general law is held to strict proof of the exception *on which he relies. These are wholly distinguishable from this case." [*363] Wherever a lien is created by contract, express or implied, the question is, what is the contract. It is probable, where there is a lien for warehouse-rent, as in the case of wharfingers and others who have a general lien, that it may be shown that the custom, by which the contract to give the lien is proved, is such as to extend it to the rent during the detention: but here the lien is that given by common law, and no more. The analogy between a right of lien at common law and a right to hold a distress is complete. In each case the law gives a peculiar privilege to a party, at his option, to enforce his right by taking the law into his own hands and detaining his debtor's chattel. In each case costs may be incurred in enforcing this peculiar process; and from time immemorial the question must have arisen who was to bear those costs. The common law never gave a plaintiff the costs of enforcing his claim at all, though statutes have given costs of suit. In cases of distress at common law, the distrainer might, if it were a live chattel, place it in a pound where the owner could come and feed it; and, if he did so, the distrainer was not bound to feed it. But if he did not put live chattels in a pound overt, the distrainer was bound to feed them at his own cost; and he had no option as to dead chattels, but was always bound to take care of them in a pound covert: Co. Litt. 47 b. This law has been altered by statute 5 & 6 W. 4, c. 59, ss. 5, 6; but the principle of common law is not the less shown. So in *Lenton v. Cook*, Bul. N. P. 45, in 9 G. 2, it was decided that, "if a horse be distrained in order to compel an appearance in a hundred court, after appearance the plaintiff cannot justify detaining the horse till paid for his keeping." *In the absence of authority the analogy is strong to show that there is [*364] no right at common law to compensation for the costs incurred in enforcing a lien. [Lord CAMPBELL, C. J.—It is suggested that they might be recovered in an action for not taking away the chattel.] That, if it were so, would not entitle the defendants to judgment. Where there is a lien, the owner of the chattel cannot maintain an action for the detention without showing that he was ready to pay all that was really due, so that it is at his peril if he offers one farthing too little. In the supposed action for not taking away the chattel, if maintainable at all, the bailee must be able to prove that he was ready to deliver the chattel on being paid what was due, so that it would be at his peril if he demanded one farthing too much: and, even if it were to be assumed that the shipwrights here had fulfilled that condition, they would but have had a right to some unliquidated damages, and could not have a right to detain the ship till they were paid whatever sum they chose to assume was the right amount. *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered judgment.

We are of opinion that, under the circumstances stated in the special case, the defendants are not entitled to retain the sum paid to them in respect of the item of 567*l.*, or any other sum, as a compensation for the use of their dock in detaining the plaintiffs' ship. As artificers who had expended their labour and materials in repairing the ship which the plaintiffs had delivered to them to be repaired, the defendants had a lien on the ship for the amount of the sum due to them for these repairs;

but we do not find any ground on which their claim can be supported to
 *365] be paid for the use of their *dock while they detained the ship
 under the lien against the will of the owners. There is no evidence of any special contract for such a payment. The defendants gave notice that they would demand 21*l.* a day for the use of their dock during the detention: but the plaintiffs denied their liability to make any such payment, and insisted on their right to have their ship immediately delivered up to them. Nor does any custom or usage appear to authorize such a claim for compensation, even supposing that a wharfinger with whom goods had been deposited, he being entitled to warehouse-rent for them from the time of the deposit, might claim a continuation of the payment during the time he detains them in the exercise of right of lien till the arrears of warehouse-rent due for them is paid (see *Rex v. Humphery, M'Cl. & Y. 178†*): there is no ground for a similar claim here, as there was to be no separate payment for the use of the dock while the ship was under repair, and the claim only commences from the refusal to deliver her up. The onus therefore is cast upon the defendants to show that, by the general law of England, an artificer who, exercising his right of lien, detains a chattel, in making or repairing which he has expended his labour and materials, has a claim against the owner for taking care of the chattel while it is so detained. But the claim appears to be quite novel; and, on principle, there is great difficulty in supporting it either *ex contractu* or *ex delicto*. The owner of the chattel can hardly be supposed to have promised to pay for the keeping of it while, against his will, he is deprived of the use of it; and there seems no consideration for such a promise. Then the chattel can hardly be supposed to be wrongfully left in the possession of the arti-
 *366] ficer, when the owner has been *prevented by the artificer from taking possession of it himself. If such a claim can be supported, it must constitute a debt from the owner to the artificer, for which an action might be maintained: when does the debt arise, and when is the action maintainable? It has been held that a coachmaker cannot claim any right of detainer for standage, unless there be an express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time, and after notice has been given him to remove it: *Hartley v. Hitchcock*, 1 Stark. 408 (E. C. L. R. vol. 2).

The right of detaining goods on which there is a lien is a remedy to the party aggrieved which is to be enforced by his own act; and, where such a remedy is permitted, the common law does not seem generally to give him the costs of enforcing it. Although the lord of a manor be entitled to amends for the keep of a horse which he has seized as an estray (*Henley v. Walsh*, 2 Salk. 686), the distrainer of goods which have been replevied cannot claim any lien upon them: *Bradyll v. Ball*, 1 Bro. C. C. 427. So, where a horse was distrained to compel an appearance in a hundred court, it was held that, after appearance, the plaintiff could not justify detaining the horse for his keep: *Bul. N. P. 45*.

If cattle are distrained damage feasant, and impounded in a pound overt, the owner of the cattle must feed them; if in a pound covert or close, "the cattle are to be sustained with meat and drink at the peril of him that distraineth, and he shall not have any satisfaction therefore:" *Co. Litt. 47 b*.

For these reasons, on the question submitted to us, we give judgment for the plaintiffs. Judgment for the plaintiffs.

*IN THE EXCHEQUER CHAMBER. [*367

The BRITISH EMPIRE Shipping Company, Limited, v. JOSEPH SOMES, FREDERICK SOMES, and SAMUEL FRANCIS SOMES. [Feb. 1, 1859.]

For syllabus, see p. 353.

THE defendants alleged error, in the Exchequer Chamber, in the above judgment. The plaintiffs denied the error.

Montague Smith, for the party alleging error (defendants below).—In this case it must be implied that the shipowners contracted to pay for the use of the dock so long as their ship was necessarily there, whether under claim of lien or not. In practice, a warehouseman in the city always charges warehouse-rent up to the day when the goods are taken away, without regard to whether they have been detained under a lien or not. It is said that this is by virtue of a contract; but all liens are created by contract. [BRAMWELL, B.—I doubt that. It sometimes appears that persons have, in making a contract, stipulated for a remedy in case of its being broken; but, in the absence of something of that sort, it is a safe rule of construction that people in making contracts contemplate that they will be performed. Your argument goes on the assumption that every one who does work on a chattel always does so in the expectation that payment will be refused till he enforces it.] Such a contract certainly is made in the case of a wharfinger. [CHANNELL, B.—In this case is there any evidence of a contract originally to pay anything in the nature of rent for the keeping of the ship?] The original contract is contained in the letters which *agree that there shall be a charge for the use of the graving dock. [COCK- [*368 BURN, C. J.—A stipulation on the part of shipwrights for such a right as here claimed might be reasonable: and, if there was any evidence of a custom to give it to them, it might be readily acquiesced in: but in the absence of any proof of either, it being clear that the law gives the artificer an option to detain the chattel, but does not bind him to do so, can we say that the law annexes a further incident that the owner of the chattel shall pay for the detention against his will? No authority to that effect was cited below; has any been found since?] It must be owned that there is an utter want of authority on the point either way.

Blackburn, for the party denying error (plaintiffs below), was not called upon.

COCKBURN, C. J.—I am of opinion that the judgment must be affirmed. I have but little to say in addition to what has already been thrown out in the course of the argument. It is not for us, sitting here judicially, to annex an incident to the law without authority and without precedent, however beneficial it might be. Such a right as is here claimed might be annexed as an incident to a bailment by a usage of trade to that effect, but not otherwise.

WILLIAMS, J.—I am of the same opinion. I cannot assent to Mr. *Smith's* contention that there is any evidence in this case of a contract to give such a right as is claimed. Such a contract may in some cases be inferred from usage of trade: but in the present case there is no more reason for inferring such a contract than in the analogous case of a distress.

*369] CROWDER, J.—I also see no reason for annexing as a matter of law this incident hitherto unheard of. There would be no difficulty in making a contract to give it: but here is no such contract.

BRAMWELL, B.—The burthen lies on Mr. *Smith* to show that such a lien exists either by law or by contract. It is enough to say he fails in doing so: but, if the onus were the other way, I should think a contract disproved. It is very improbable that, when taking the ship in to do the work, the shipwrights and shipowners contemplated that there would be any difficulty about the payment. I see much to make me say it would have been prudent to make a contract as a security, nothing to lead me to infer that such a contract was made.

WATSON, B.—I am of the same opinion. I think the analogy between a lien and a distress at common law very strong; and the authorities are decisive that at common law the distrainor had no compensation for the costs of impounding the chattel, or of feeding it if he did so.

CHANNELL, B.—I am of the same opinion. I think the shipwrights could not be entitled to the right they claim unless there was a contract to give it to them. If it had been part of the original agreement that a charge in the nature of standage or warehouse-rent should be paid for the custody of the ship, it might have been one element from which an agreement to continue that payment during the detention might have been inferred. Without expressing any opinion as to whether that circumstance, if it had existed, would alone have been *enough to justify the inference of such a contract, I say that I cannot agree with Mr. *Smith* in thinking that the charge for the dock here was in that nature. It seems to me only one item in the price for the work, labour, and materials.

Judgment affirmed.

Affirmed in the House of Lords, who had a lien for his labour and May 22, 1860: *Somes v. British Empire* services on a chattel, was made in Shipping Co., 6 Jurist N. S. 761; 2 *M'Intyre v. Carver*, 2 Watts & Serg. Law Times N. S. 547. 392; but apparently not sustained.

A claim for storage, by a mechanic

WADDINGTON, ELLIOTT, WILCOX, WEBSTER, SPRAGUE.
and CLARKE, v. The Guardians of the Poor of the CITY OF
LONDON UNION. May 26.

The Union of L., formed under stat. 4 & 5 W. 4, c. 76, consisted of ninety-eight parishes, and had a Board of Guardians annually elected. In February, 1857, large sums were owing to tradesmen for food, &c., supplied to the poor of the Union, and which had been incurred principally in 1856, and partly in preceding years. The arrears were owing to embezzlements by M. and P. M. had been appointed by the Guardians collector for nine of the parishes; which appointment had been confirmed by the Poor Law Commissioners. P. was assistant clerk

of the Guardians. The Guardians had ordered M. to pay the rates collected for the nine parishes to the treasurer of the Union. M. appropriated the greater part, and, in concert with P., made false entries in the Union ledger, representing the sums as having been all paid to the treasurer. The accounts made out from these entries were produced to the auditor and certified by him as correct. P. had appropriated checks drawn in favour of tradesmen, which were entered as payments in the accounts which were audited and passed as correct. The Guardians had also overdrawn the treasurer's account to a large amount accruing during several years before February, 1857. The embezzlements by M. and P., and the consequent arrears to the tradesmen, were first discovered in December, 1856. No call was after that made on the parishes until February, 1857, when the then clerk of the Union, under article 81 of The Consolidated Order made 24th July, 1847, by the Poor Law Commissioners, ascertained the costs to each parish for the maintenance of the poor, estimating as "extraordinary charges" for the ensuing half year the amount of the arrears to the tradesmen and the debt to the treasurer, and divided the whole among the different parishes: and the Guardians, under article 82, made orders, on 17th February, 1857, on the overseers of the several parishes for payment. A parish, not being one of the nine for which M. collected, disputed the validity of the order. All previous calls had been paid. Held (before stat. 22 & 23 Vict. c. 49), that the order was wholly bad, as being partly in the nature of a retrospective rate, though in fact there were items, besides those mentioned, free from objection.

The more so, as it appeared that there had been great changes in the occupation of rateable property in the parish.

By the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench.

A CASE, of which the material parts were as follows, was stated for the opinion of this Court, by consent of parties, and by order of a Judge, pursuant to sect. 46 of The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

*The plaintiffs, at the time of the making of the order herein- [*371 after mentioned, were the churchwardens and overseers of the poor of the parish of Saint Stephen Coleman Street, in the City of London; which, together with ninety-seven other parishes, during all the time hereinafter mentioned, was, and still is, comprised within the City of London Union; and which Union was formed in the year 1837, under the provisions of stat. 4 & 5 W. 4, c. 76 (The Poor Law Amendment Act) under which boards of guardians have been annually elected, and have entered into office for the said Union.

Under and according to the provisions of the said Act, the Poor Law Commissioners for England and Wales, from time to time, made and issued divers rules, orders, and regulations. It is agreed that, if either party should wish to refer to any order or orders of the Poor Law Commissioners not set out in the body of the present case, such party shall be at liberty to do so; and that, for this purpose, the orders shall be taken to be as set out in the book entitled "The Consolidated and other Orders of the Poor Law Commissioners and of the Poor Law Board," &c., by William Cunningham Glen, a copy of which accompanies this case, and which copy, so far as relates to the said rules, orders, and regulations, is to be taken to form part of this case.(a)

(a) The references in the text are made to the 4th edition, London, 1859. The references in the case, as originally stated, were to an earlier edition.

The orders not set out in the body of the case, but referred to in argument in the Courts of Queen's Bench and Exchequer Chamber, were the following:

"The Consolidated Order," dated 24th July, 1847.

Article 41 (p. 20). "At every ordinary meeting of the Guardians the business shall, as far as may be convenient, be conducted in the following order:

"Firstly," &c. "Sixthly—They shall examine the treasurer's account, and shall, when necessary, make orders on the overseers or other proper authorities of the several parishes in

*372] *By articles 81 and 82 of an order made by the said Commissioners as aforesaid, and dated 24th July, 1847, *addressed to the
 *373] City of London Union, and many other Unions, and commonly distinguished by the name of The Consolidated Order, it is provided and ordered as follows.

Article 81.(a) "The clerk" (meaning the clerk to the Guardians, see Article 229) "shall, four weeks at least before the 25th day of March and the 29th day of September respectively in each year, refer to and ascertain the cost to each parish in the Union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half of the last year, corresponding to the half year next coming, and shall estimate and, as near as may be, divide amongst the parishes any extraordinary charges to which the Union may be liable in the coming half year, and he shall also estimate the probable balance due to or from the parish at the end of the current half year, and shall then prepare the orders on the several parishes for the sums which, upon such computation, it shall appear necessary for them to contribute to the expenses of the Union for the coming half year; and the orders so prepared shall be laid before the Guardians for their consideration, three weeks at least before the expiration of the current half year."

Article 82.(b) "The Guardians shall make orders on the overseers or other proper authorities of every parish of the Union, from time to
 *374] time, for the payment to the *Guardians of all such sums as may be required by them for the relief of the poor of the parish, and for the contribution of the parish to the common fund of the Union,

the Union, for providing such sums as may be lawfully required by the Guardians on account of the respective parishes."

Article 50 (p. 29). "Every contract to be hereafter made by any Guardians shall contain a stipulation requiring the contractor to send in his bill or account of the sum due to him for goods or work, on or before some day to be named in the contract."

P. 124. "Duties of the clerk. Art. 202.—The following shall be the duties of the clerk: No. 1." &c. "No. 7. To ascertain, before every ordinary meeting of the Board, the balance due to or from the Union, in account with the treasurer, and to enter the same in the minute book."

P. 133. "Duties of the treasurer of the Union. Art. 203.—The following shall be the duties of the treasurer of the Union:—No. 1," &c. "No. 3. To keep an account, under the proper dates, of all moneys received and paid by him as such treasurer, to balance the same at Lady Day and Michaelmas in every year, and to render an account of such moneys to the Guardians, when required by them to do so. No. 4. Whenever there are not funds belonging to the Guardians in his hands as treasurer of the Union, to report in writing the fact of such deficiency to the Commissioners."

Article 220 (p. 171). "Every clerk receiving any check or money from the Guardians on account of any other party, shall transmit the same within fourteen days to the proper persons, and shall produce the receipt or acknowledgment for the same at the next ordinary meeting after the same has come to his hands."

Form M. (p. 180), entitled "Order for Contribution," substantially corresponded to the order set out in the text, p. 374.

By the "Collection of Poor-Rate Order," made 16th March, 1854, it was ordered as follows:

Article 6 (p. 397). "The collector shall every week pay over all moneys collected by him, or in his hands, belonging to the parish, to the banker whom the overseers may direct, to be placed to the account of one or more of them; or, if directed by one of the overseers, to the treasurer of the Guardians of the Union, in payment of any order from such Guardians then due; or, in the absence of any such direction, shall pay the same to one of the said overseers in person; provided that as often as at any time in the course of any week the sum or sums of money in the hands of such collector belonging to the parish shall together exceed fifty pounds, he shall forthwith pay over such sum or sums in the manner hereinbefore directed."

(a) Page 44.

(b) Page 45.

and for any other expenses chargeable by the Guardians on the parish; and in such orders the contributions shall be directed to be paid in one sum or by instalments, on days specified, as to the Guardians may seem fit."

On the 17th of February, 1857, a call or order was made according to form M.(a) in the said Consolidated Order, by the then Guardians of the poor of the said Union upon the then churchwardens and overseers of the poor of the said parish of St. Stephen Coleman Street, a copy whereof is as follows.

"City of London Union.

"To Messrs. James Waddington, John Elliott, Isaac Wilcox, John Webster, William Sprague, and Jeremiah Clarke, churchwardens and overseers of the parish of Saint Stephen Coleman Street, in the City of London.

"You are hereby ordered and directed to pay to Samuel George Smith, Esquire, at the banking-house of Messrs. Smith, Payne, and Smith's, No. 1, Lombard Street, in the city of London, on behalf of the Guardians of the poor of the City of London Union, the sum of 2800*l.* from the poor-rates of the said parish of Saint Stephen Coleman Street, towards the relief of the poor thereof, and to the contribution of the parish to the common fund of the Union, and such other expenses as are chargeable by the said Guardians on the said parish. Such sum of 2800*l.* to be paid by instalments at the times and in manner following (that is to say"):

*"The sum of 700*l.* on or before the 20th day of March, 1857,"
 &c.; the last (fourth) instalment on or before 20th August, 1857: [*375
 "and to take the receipt of the said Samuel George Smith, endorsed upon this paper, for the said sums respectively.

"Given under our hands at a meeting of The Guardians of the poor of the City of London Union, held on the 17th day of February, 1857."

"JOSEPH TAYLOR. Presiding chairman.

"JAS. ABBISS,
 "CHARLES CRANE, } Guardians.

"A. J. BAYLIS. Acting clerk to the Guardians.

Similar orders were on the same day made by the said Guardians upon each of the other parishes comprised within the said Union. And, by the aggregate of such orders, the said Guardians sought to raise, and ordered to be raised, a sum of 61,430*l.*

Previously to the 29th September then next before the making of the said order of the 17th day of February, 1857, for the purposes of complying with the requirements of the 81st section of the Orders of the said Poor Law Commissioners, the then clerk of the said Guardians referred to and ascertained the cost to each parish in the said Union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the last half year corresponding to the half year next ensuing. The said clerk also estimated the extraordinary charges to which, according to his view (the correctness of which the plaintiffs dispute), the Union would be liable. The said clerk, in his estimate of the extraordinary charges to which, according to his view, the Union would be liable in the ensuing half year, included the amount of the outstanding debts to *the tradesmen of the Union, and the advances made by the treasurer of the Union and not repaid to [*376

him as hereinafter stated. The following statement was prepared by him of the aggregate amount required, according to his view, for those purposes, and submitted to the Board of Guardians.

Abstract of tradesmen's accounts.

Date of first item in the bill.	Date of last item in the bill.	Names of tradesmen.	Trade.	Amount of each bill.	Total amount of each class of bills.
		Provisions Account.		£ s. d.	
1856. June 24.	1856. December 27.	Lee & Sons.	Butchers.	2336 15 9	

&c., &c., &c.

Then followed items for Clothing Account, Out Relief, Baking Account, Lunatics, Loan Account, Funeral Account, Common Charges and Establishment, respectively. The earliest dated item was 29*l.* 12*s.* 2*d.* for ironmongery, June 24th, 1851; and the items latest dated were 211*l.* 16*s.* 2*d.* to flour factors, and 86*l.* 2*s.* 6*d.* to news-venders; both dated December 29th, 1856. By far the largest quantity of items, both in number and amount, were of 1856. The sum total was 28,154*l.* 17*s.* 2*d.*

The case then proceeded as follows.

	£	s.	d.
Debts due from the City of London Union to tradesmen to Christmas, 1856 (say)	23,000	0	0
Balance due to treasurer to December 31st, 1856	4,200	0	0
Estimated expense of the Union to Lady Day, 1857 (say)	15,000	0	0

Making a total of . . . £42,200 0 0

*377] *Towards which amount there is the arrear of the call made on the 2d September, 1856, amounting to about	£	s.	d.
	10,000	0	0

Leaving a sum of	32,200	0	0
Add estimated expenditure from Lady Day, 1857, to Michaelmas, 1857	29,230	0	0
	61,430	0	0

It is admitted, but for the purposes of this case only, that all the said sum of 28,154*l.* 17*s.* 2*d.* had been properly incurred, and had not been paid to the tradesmen; and that the said treasurer, who was the treasurer of the Union named in the said orders, and had been duly appointed as such in pursuance of the Orders of the Poor Law Board, had, before December 31st, 1856, made advances to the amount of 4200*l.* to the Guardians of the Union, by allowing them to overdraw their account with him to that extent; and that these advances had not been replaced: which amount is the sum entered in the above statement as "Balance due to treasurer to December 31st, 1856." And that the said estimate of 15,000*l.* for the expense of the Union to Lady Day, 1857, and that

the said estimate of 29,230*l.* for expenditure from Lady Day, 1857, to Michaelmas, 1857, were fair and reasonable estimates.

The said sum of 61,430*l.* was apportioned amongst the various parishes of the said Union as follows: that is to say: each parish was separately charged with the sum required by the Guardians for the relief of the poor of such parish for the period specified; and the residue of the said sum of 61,430*l.* was apportioned amongst the various parishes of the Union as their estimated *rateable contribution to the common fund of the Union, and other expenses assumed to be chargeable [*378 by the said Guardians on the said parishes respectively, according to the proportions last fixed by the Poor Law Board, in pursuance of sect. 28 of stat. 4 & 5 W. 4, c. 76. And the said orders were prepared by the said clerk of the Guardians according to such computation and apportionment, and laid before the said Guardians according to the said articles, and made and issued by them accordingly. To this apportionment the plaintiffs object.

The plaintiffs object to the said statement or estimate on the ground that it appeared by the dates, which are admitted to be correct, that it includes alleged debts which had been accruing for several previous years; and that the alleged debt of 4200*l.* to the treasurer had been gradually accruing during several years previously to the said 17th February 1857; which is admitted by the defendants.

The plaintiffs further object to this statement or estimate on the ground that such alleged debts, or a portion of them, ought to have been paid out of moneys raised by calls or orders previously made. Such non-payment in fact arose from the frauds and embezzlements of two of the officers of the Union, viz. Charles Guerrino Manini and John Paul.

The said C. G. Manini was, on the 16th May, 1843, appointed by the Board of Guardians collector for nine of the parishes of the Union, the said parish of St. Stephen Coleman Street not being one of those nine. This appointment was duly confirmed by the Poor Law Board. And, in pursuance of an order of the Poor Law Board, Manini thereupon entered into a bond with two sureties (from whom nothing has been or could be *recovered) in the penal sum of 500*l.* to the Board of Guardians, for the faithful performance of his duties. Manini [*379 collected the whole of the rates levied for the relief of the poor in such nine parishes. His orders from the Guardians were to pay the whole amount to the treasurer of the Union, to be placed by the clerk of the Union to the credit of the respective nine parishes in the Union accounts, the parish officers receiving checks from time to time, from the Board of Guardians, for moneys required by them for parochial payments not connected with the Union. Shortly before the making of the said order or call of 17th February 1857, Manini had absconded, having embezzled, from the money so collected by him for the rates of the said nine parishes, large sums of money, amounting, as has since been ascertained, to 22,407*l.* 8*s.* 2*d.*

The said John Paul had been duly appointed, and was, the assistant clerk of the Board of Guardians. Returns were laid by J. Paul before the Board of Guardians weekly, showing that large sums had been paid to the treasurer by Manini on account of the said several nine parishes, which sums were carried to their credit in the Union parochial ledger.

The greater portion of which accounts never reached the treasurer's hands, but were in fact embezzled by Manini.

The returns were thus false; and they were in this respect false to the knowledge of both Manini and Paul; and Manini and Paul acted in concert in making this false representation by means of returns so laid before the Board of Guardians.

The parochial accounts were regularly produced to the district auditor, signed by the parish officers; but these accounts were made up from figures *380] and returns *concocted by Manini, and handed by him to the parish officers, from which they were copied into their receipt and payment book. Thus credits were given for large sums which never reached the treasurer's hands: and the balance-sheets of the overseers' receipts and payments were signed by the auditor, with the usual memorandum at the foot, certifying the balance to be correct. The parochial accounts had been audited up to the 29th September, 1856. These fraudulent entries have been published in the annual statement of accounts, which was printed and circulated by order of the Guardians, up to Lady Day, 1855.

The said J. Paul defrauded the said Union of various sums of money, amounting to 3000*l.* at the least, by appropriating to his own use orders or checks drawn in favour of tradesmen of the said Union, and which were intrusted to him for the purpose of being handed by him to such tradesmen, and which were not in fact so handed over. In some of the accounts, so audited and published as aforesaid, some portions of the debts included in the said statement or estimate of the said clerk of the said Guardians were entered and debited as paid; and the said accounts, though fraudulently concocted, were so audited and passed as correct, and acquiesced in by all parties.

Manini and Paul absconded in December 1856. The former has not yet been apprehended. The latter was apprehended and convicted of felony, and sentenced to transportation.

The frauds and embezzlements aforesaid were first discovered in December 1856: and the call made in February 1857 was the first call made after such discovery. In making the estimate for such call, the *381] deficit *resulting from the said frauds and embezzlements was treated as an extraordinary charge upon the Union; and so the several debts aforesaid were included in the said statement or estimate as chargeable upon the funds of the whole Union. And, assuming that they were so chargeable, the said parish of St. Stephen Coleman Street was charged with its fair proportion by the said order or call of February 1857; and the amount of the said order or call was on that assumption correct.

All calls or orders made upon the said parish of St. Stephen Coleman Street previously to the making of the said call or order of 17th February, 1857, had, previously to the making of such last-mentioned call or order, been fully paid and obeyed.

The said parish of St. Stephen Coleman Street contains upwards of five hundred houses or tenements, which were separately assessed to the rates for the relief of the poor in every year for six or seven years *now last past*; during which last-mentioned period there have been changes in the occupations and rateable value of such houses and tenements. Many valuable messuages, tenements, and premises, which were, during

all or some of the years in which the said old alleged outstanding debts were in the manner stated accruing, chargeable with the poor-rates, and of which the occupiers were during such year or parts of years liable in common with other occupiers of premises within the said Union to be rated and assessed to the poor-rates of the several parishes comprised therein, and were well able so to contribute rateably, and did in fact contribute, towards the payment of the expenses in respect of which the said old alleged outstanding debts accrued, were, during all the period between the 17th of February, 1857, and 29th of *September, 1857, pulled down and unoccupied, and not rateable or [*382 assessable to the poor-rates, or liable so to contribute. And many persons have become the occupiers of tenements within the said parish or Union since the said old outstanding debts respectively accrued and became due, who would not have been liable to contribute to the expenses in respect of which such debts accrued by virtue of any poor-rates made previously to the 17th of February, 1857. And such persons are now liable to be respectively assessed to the poor-rates of parishes comprised in the said Union, and thus be liable to contribute towards the payment of such old outstanding debts, if the said call or order of 17th February, 1857, is a valid and legal order, enforceable for the amount for which it is made.

It is contended by the plaintiffs that the said order or call is altogether bad in law, and cannot be enforced: and that, even if good as to any part, it is bad and cannot be enforced for such portion as relates to the quota of the said parish of St. Stephen Coleman Street of the said alleged debts included in the said statement or estimate as aforesaid.

The case then set out a correspondence between Thomas Jones, vestry clerk of the parish of St. Stephen Coleman Street, on behalf of the officers of that parish, and the treasurer of the Union, and the deputy chairman of the Guardians of the Union and their solicitor. The correspondence commenced on 23d March, 1857, and ended on 28th April, 1857. It related to the maintenance of the poor during the continuance of the dispute, and to the best means of bringing the questions before the Court.

The case then stated the questions for the opinion of the Court to be:

*1st, Whether the said call or order of the 17th February, 1857, [*383 is a valid and enforceable call or order for the whole, or for any, and what, portion of the said sum of 2800*l*.

2d. Whether the plaintiffs or the churchwardens and overseers for the time being of the said parish of St. Stephen Coleman Street are liable and bound in law to pay any, and what, portion of the said sum of 2800*l*.

If the Court shall be of opinion that the said call or order is not valid or enforceable, and that the plaintiffs are not liable or bound to pay any portion of the said sum of 2800*l*., then judgment is to be entered for the plaintiffs for the sum of 5*l*. 5*s*.

If the Court shall be of opinion that the said call or order is valid and enforceable, or that the plaintiffs or the churchwardens and overseers for the time being of the said parish of St. Stephen Coleman Street are liable and bound in law to pay a portion of the said sum of 2800*l*., then judgment is to be entered for the defendants.

And the parties agree that the sum, if any, to be paid by the plain-

tiffs or by the churchwardens and overseers for the time being of the parish of Saint Stephen Coleman Street shall, as the Court shall be pleased to direct, be fixed either by the said Court, or by such arbitrator as the Court shall name, upon, such principles as the Court shall be pleased to lay down.

And the parties agree that the costs of the whole proceedings, including those of the present and any future arbitration, shall be paid by either party as the said Court shall be pleased to direct, or by the several parties in such proportions respectively as the Court shall be pleased to direct.

*384] *The case was argued in last Term.(a)

H. Hawkins, for the plaintiffs.—The order of 17th February, 1857, is bad, being, as to a part at least, for retrospective purposes. That this is contrary to general principle appears from the language of Lord Kenyon in *Durrant v. Boys*, 6 T. R. 580; *Rex v. Wavell*, 1 Doug. 116; *Rex v. Maulden*, 8 B. & C. 78 (E. C. L. R. vol. 15); *Rex v. Churchwardens of Dursley*, 5 A. & E. 10 (E. C. L. R. vol. 31). The reason is that, by such a practice, parties would become liable who had nothing to do with the expense incurred; and in the present case the facts stated show that this consequence would work enormous injustice. Nor is this altered by stat. 4 & 5 W. 4, c. 76. Sect. 15 authorizes the Commissioners to make rules: and under this authority The Consolidated Order mentioned in the case has been made. By the 6th regulation in Article 41 the Guardians of Unions, at every ordinary meeting, are to examine the treasurer's account, and to make orders on the overseers of the parishes for providing the sums which the Guardians require on account of the parishes. By Art. 81 the clerk of the Union is, every half year, to ascertain the half-yearly charges of maintenance, and to "estimate" and divide among the parishes "any extraordinary charges to which the Union may be liable in the coming half year," and to "prepare the orders on the several parishes for the sums which, upon such computation, it shall appear necessary for them to contribute to the expenses of the Union for the coming half year." By Art. 82 the *385] Guardians are to make the orders. And *it is under this authority that it is sought to uphold the order now in question. The defendants here contend that "extraordinary charges" include any liabilities which may exist in the course of the half year, however long back such liabilities may have been incurred. But, upon the principles already pointed out, they can include only liabilities which will accrue from time to time for current expenses. [Lord CAMPBELL, C. J.—You are certainly entitled to succeed, if you show that you are not liable; and you are not bound to point out who is. But can you suggest who is?] It is not easy to do so: it rather seems that the tradesmen or the treasurer have no remedy against the parochial authorities: the debt should not have been allowed to run on. What the clerk may "estimate," under Article 81, appears from a decision on an analogous provision in stat. 5 & 6 W. 4, c. 76, s. 92, *Woods v. Reed*, 2 M. & W. 777,† where it was held that the council of a municipal borough cannot, in estimating the sum required for carrying the Act into effect, include past expenses. Here, from gross negligence on the part of the Union authorities, a fraud

(a) April 27th, 1853. Before Lord Campbell, C. J., Erle and Crompton, Js. Wightman, J., was present during the early part of the argument.

is committed which is but recently discovered. The fraud consisted in concealing the non-payment of the tradesmen's bills and the advance from the treasurer. But the date of the discovery of the fraud is not the date of the accruing of the liability. [ERLE, J.—Suppose a collector absconds on the last day of any half year: how is that to be met? Are the paupers to starve? WIGHTMAN, J.—Or suppose a loss by fire on that day.] That might perhaps alter the case: the Guardians might say that they had done all in their power. But here the liabilities now exist through the *neglect of the Guardians. The articles clearly are framed with a view to a speedy settlement of all liabilities. [*386 [ERLE, J.—That seems to be so: yet you cannot insist that every loaf of bread must be paid for by ready money.] The debts ought to be included in the earliest practicable estimate. Next, as to these particular charges, Manini was collector for nine parishes only, which do not include that of the plaintiffs: the money is in the hands of the servant of the nine parishes. As to the debt owing to the treasurer, it cannot be included at all: it is simply for money borrowed by the individual. By Article 203, No. 4, the treasurer is to report to the Guardians whenever he has not in his hands funds belonging to the Union: there is no authority to borrow or advance. Then, if the order be bad for part, it is bad totally: (a) a new and valid order must be issued. The correspondence shows that the plaintiffs ought to be allowed the costs.

Pashley, contrà.—The tradesmen, who have supplied articles not paid for, may recover from the guardians, who are a corporation under stats. 5 & 6 W. 4, c. 69, s. 7, 5 & 6 Vict. c. 57, s. 16. Then execution must issue on the corporate property, to replace which a rate, clearly not retrospective, would be wanted: or a rate might be laid to satisfy the judgment. [Lord CAMPBELL, C. J.—Would that have been so, in cases before stat. 4 & 5 W. 4, c. 76?] There were then no corporations to incur the debt. It appears from *Harrison v. Stickney*, 2 H. L. Ca. 108, that there is no general rule of law prohibiting a retrospective rate: the question must depend upon the particular Act under which the rate is laid. It is absurd to *suppose that a rate becomes void if it extend back to a single item. [ERLE, J.—In *Harrison v. Stickney* the question arose as to works done under a drainage Act: such works must become necessary at very uncertain times.] In *Jones v. Johnson*, 7 Exch. 452,†(b) the Court of Exchequer Chamber remarked upon *Woods v. Reed*, 2 M. & W. 777,† and must be considered to have disallowed the authority of that case. The argument on the other side answers itself; for it was found necessary to contend that tradesmen, who do not press for payment of their bills, are without remedy. The neglect of duty by former guardians may be wrong, or even criminal: but it cannot affect the question of civil action. The "extraordinary charges" are those which already have accrued, not merely, if at all, those which may accrue. The Union had become liable at the time when the estimate was made, and of course would continue to be so in the ensuing half year, and until the payments should be made. No distinction can be made between the nine parishes and the others: the money, when received, was money belonging to the Union; and the

(a) See *Rex v. The Chapelwardens of Haworth*, 12 East 556.

(b) In the Exchequer Chamber, affirming the judgment of the Court of Exchequer in *Jones v. Johnson*, 5 Exch. 862.†

whole Union is liable to the loss, as it would have been if the guardians had received the money in bank notes which had afterwards been accidentally burned. Paul, the assistant clerk of the whole Union, is a party to Manini's fraud. The general system was intended to combine parishes together: Manini may have been appointed by the guardians, without the consent of the nine parishes, under sect. 46 of stat. 4 & 5 *388] W. 4, c. 76: he is, *properly, an officer of the whole Union. As to the debt to the treasurer, it is impossible but that there must be fluctuations in the account: the balance cannot always be against him. The order may well be good for part and bad for part: any part may be disallowed by the auditor or Poor Law Commissioners, without affecting the rest. The case shows no technical ground of action by these plaintiffs against these defendants. [LORD CAMPBELL, C. J.—We understood that the case was drawn, by consent, with the view of obtaining the opinion of a Superior Court.] That objection, then, is not pressed.

H. Hawkins, in reply.—As to the balance due to the treasurer, the authorities show that there can be no rate for its payment: *Tawny's Case*, 2 Salk. 531, *Rex v. Wavell*, 1 Doug. 116. Sect. 47 of stat. 4 & 5 W. 4, c. 76, requires accounts of overseers and treasurers to be passed quarterly; and the section refers expressly to balances. There is no more difficulty now in the case where money is wanted, and there are no funds in the hands of the treasurer than there was before stat. 4 & 5 W. 4, c. 76. The credit of the Union may be pledged for immediate necessities, but not for money borrowed to pay them. [CROMPTON, J.—Art. 202, No. 7, speaks of "the balance due to or from the Union, in account with the treasurer."] That is the only expression which can be found suggesting that the Union may become indebted to the treasurer; and the question is still open, whether a rate can be made retrospectively. If the Guardians themselves had embezzled money they could not have made a rate to supply the default. [CROMPTON, J.—*389] Why not? They *form a corporation. The embezzlers would be individuals.] Suppose, under their corporate seal, they had ordered money in their hands to be applied to building a theatre. Manini was not an Union officer; the collectors, like the assistant overseers, must obey the orders of the overseers of the particular parishes, by stat. 7 & 8 Vict. c. 101, ss. 61, 62. The money collected goes to the coffer of the overseers, not of the Guardians, till paid over by the overseers. The order by the Guardians that the collector should pay to the treasurer was illegal: Article 6 of the Order of 1854.(a)

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

In this case certain debts due from the Guardians of the Union to tradesmen, amounting to 23,000*l.*, and a debt due from them to the treasurer of 4200*l.* by reason of overdrawing their account, remained unpaid at Christmas 1856. These debts so remained, by reason of the frauds and embezzlements of Manini, a collector for nine parishes of the Union of ninety-eight parishes, and of Paul, the assistant clerk of the Board of Guardians. The frauds were discovered in December 1856; and, by the call in question, in February 1857, these debts are

(a) *Glan*, p. 397.

provided for. And so the questions are raised, Whether the call is valid, and, if so, Whether the plaintiffs are liable for the whole of it.

Our answer to both questions is in the affirmative.

The objection to the validity is founded on the duty of each Union and parish to provide funds for expenses as they become due, so that retrospective rating, as a *general principle, is prohibited. But this general principle is subject to exceptions: and we consider [*390 the present case to be an exception.

The debts, when created, were, according to the statement, legally binding, and could be enforced against the Guardians as a corporation. And that liability continues unless, by lapse of time or other legal bar, the right has been defeated.

Substantially, the debts accrued in 1855 and 1856; the small amount in 1854 being almost immaterial.

There was no intentional delay on the part of the parochial authorities who provided present funds for present demands: and there was no intentional wrong in the creditors who delayed the enforcement of their claims. We see no ground for saying that the debts were destroyed: and, if they remained, they were an extraordinary charge to which the Union was liable in the coming half year, and so within the power conferred on the Guardians by Article 81 of the Order of 1847.

If the creditors could recover their debts from the Guardians, and the Guardians are not personally liable, the call is the proper source of payment.

The second question is, Whether the plaintiffs are liable for the whole call, that is whether they are liable for the debts caused by the defalcations of Manini, who was the collector for nine parishes, not including the plaintiffs' parish; the plaintiffs contending that those nine parishes ought to make good the loss occasioned by their officer. But the answer appears to depend on the point, Whether Manini ought to be considered as the officer of those parishes or as the officer of the Union: and we are of opinion that he is the officer of the Union. The case finds that he was appointed by the Board of *Guardians, and ordered by [*391 them to pay what he collected to the treasurer of the Union. This statement negatives the point, made for the plaintiffs, that the duty of Manini was regulated by that part of the Order of 1854, Article 6, which directs him to account weekly with the overseer, or with the treasurer under the order of the overseer.

We therefore think the plaintiffs liable for the whole call, and give our judgment for the defendants. Judgment for defendants.

IN THE EXCHEQUER CHAMBER.

[November 3, 1858.]

[For syllabus, see ante, p. 370.]

THE plaintiffs in the preceding case alleged error in the judgment, which the defendants denied. The case was argued in the Exchequer Chamber in Trinity Vacation, (a) 1858.

(a) June 17th. Before Cockburn, C. J., Willes, J., and Martin and Watson, Bs.

E., B. & E.—15

Watkin Williams, for the party alleging error (plaintiffs below).—First, the order is bad, as being in the nature of a retrospective rate. (As to this, he cited the cases mentioned in the argument below.) The order is defended, as being for “extraordinary charges,” in the sense in which the words are used in Article 81. But by those words only legal charges are meant, not falling under the ordinary heads of expenditure. Such are the expenses of litigated settlements, casual poor, the emigration of paupers, a contagious disease, the election of Guardians, *392] expenses attending the change in the law of burial, or *district schools. (The Court intimated that it would be convenient to hear, at this stage, the argument in support of the order.)

Pashley, for the party denying error (defendants below).—This is not a retrospective order at all. The rate is called for to meet, not bygone charges, but claims which may be enforced at any moment. The Guardians would have no answer to an action by the tradesmen; and they must lay a rate to satisfy a judgment; for which a mandamus would go. Surely, if money were lost during a half year, a rate to supply the loss could be afterwards made. What expenses, if not these, could the outgoings of a preceding half year, ascertainable under Article 81, comprehend? Then, these are “charges,” and they are “extraordinary.” And, further, the charges may be allowed or disallowed by the auditor, under the 32d and following sections of stat. 7 & 8 Vict. c. 101; and, by stat. 11 & 12 Vict. c. 91, s. 4, &c., the charges may be allowed, though not legally made. It might turn out, on the inquiry by the auditor, that every person objecting to the items had assented by some act. There must be some mode of paying the tradesmen. [COCKBURN, C. J.—That argument might as well have been urged if nothing had been raised for the purpose: yet there the rate would have been unquestionably retrospective. There would be no limit except the Statute of Limitations.] As to the debt to the treasurer, Article 202, No. 7, shows that there may be a balance due to him “from the Union.” [MARTIN, B.—That cannot make the law.] It is essential that the Guardians shall, upon emergencies, have the power of commanding money without waiting till they can levy a rate.

*393] *Watkin Williams*, contra.—It is not to be assumed that the tradesmen can recover at all. At any rate, it was not intended by the Consolidated Order to alter the law. By Article 50 the contracts by the Guardians ought to contain a stipulation as to the day on which the account is to be sent in; and, by Article 41, sect. 6, orders should be made for the sums to be provided, at the ordinary meetings. [WATSON, B.—By Article 220, the clerk receiving a check from the Guardians is to produce a corresponding receipt at the meeting next after its coming to his hands. *Pashley*.—The clerk in this case produced forged receipts.] *Ernest v. Nicholls*, 6 H. L. Ca. 401, shows that no right of action arises against a corporation upon contracts which the corporate authorities have no right to make. Further, the call should be made, if at all, on the particular parishes whose officer caused the default. [COCKBURN, C. J.—The credit has been given to the Guardians.] That is certainly so: but it does not follow that the Guardians are to make the order on all the parishes. The collector is paid by the overseers. [COCKBURN, C. J.—The Guardians, though they appoint collectors for the whole Union, must assign to them particular districts,

when the Union is extensive.] By Art. 6 of the Collection of Poor-Rate Order (a) the collector is weekly to pay all the moneys he has collected to the banker of the overseers, or, if one overseer so direct, to the treasurer of the Union. The money embezzled by the collector was therefore the money of the overseers. As to the money advanced by the treasurer, the advance was unauthorized, as shown by the authorities cited below. It is only in particular cases, as those specified in sect. 24 of stat. 4 & 5 W. 4, c. 76, that the Guardians can borrow. *Under Art. 203, No. 4, the treasurer ought to report to the Commissioners whenever he has not funds. *Cur. adv. vult.* [*394]

WATSON, B., now delivered the judgment of the Court.

This is an appeal from the judgment of the Court of Queen's Bench upon a special case. And the substantial question is, Whether an order for the payment of the sum of 2800*l.*, made, on the 17th February, 1857, by the Guardians of the poor of the City of London, upon the parish of St. Stephen Coleman Street, purporting to be an order made under the authority of article 82 of The Consolidated Order of The Poor Law Commissioners, dated the 8th December, 1847, (b) was a valid order.

The City of London Union consists of ninety-eight parishes, of which St. Stephen Coleman Street is one. Upon the 17th February, 1857, the Guardians made orders upon all the parishes of the Union for the payment of the aggregate sum of 61,480*l.*, to be paid by them. This sum was composed of several items: viz., 23,154*l.*, outstanding debts due to tradesmen at Christmas, 1856; 4200*l.*, a balance due to the treasurer on the 31st December, 1856; 15,000*l.*, the estimated expenses of the Union to Lady Day, 1857; and 29,230*l.*, the estimated expenses from Lady Day, 1857, to Michaelmas, 1857.

The two latter sums are admitted to be fair and reasonable estimates.

The debts due to the tradesmen had been accruing due for several previous years, as had also the debt due to the treasurer. The non-payment of the tradesmen's bills arose from the fraud and embezzlement of two persons named Manini and Paul. [*395]

Manini was collector for nine of the parishes of the Union (St. Stephen Coleman Street not being one). He was appointed by the Board of Guardians on the 16th May, 1843; and his appointment was confirmed by the Poor Law Board. He was directed by the Guardians to pay the rates received by him to the treasurer of the Union, to the credit of the respective nine parishes, in the Union accounts. In December, 1856, Manini absconded, having embezzled, out of the rates collected by him from the parishes of which he was collector, 22,407*l.* His sureties, which were to the amount of 500*l.*, turned out worthless. Paul was an assistant clerk of the Board of Guardians. He also absconded in December, 1856, having embezzled at the least 3000*l.*

The parochial accounts had been audited up to September, 1856, upon false and fraudulent accounts, concocted by Manini: and the fraudulent entries were published up to Lady Day, 1856. These embezzlements were discovered in December, 1856. The disputed orders were made in February, 1857, and were the first orders made after the discovery. The clerk, in making the estimate directed by Article 81 of The Consolidated Order, had treated the deficit resulting from the embezzle-

(a) Glen, p. 397.

(b) The date appears to be 24th July, 1847. See Glen, p. 190.

ments and the debt due to the treasurer as "extraordinary charges," chargeable upon the funds of the whole Union within the meaning of these words in the 81st Article. The order upon St. Stephen Coleman Street for 2800*l.* was the proper proportion payable by this parish if the charge of 61,430*l.* upon the Union at large was lawful.

*396] The case sets out the following important particulars *with reference to St. Stephen Coleman Street. All calls or orders made upon the said parish of St. Stephen Coleman Street previously to the making of the said call or order of 17th February, 1857, had, previously to the making of such last-mentioned call or order, been fully paid and obeyed. The said parish contains upwards of five hundred houses or tenements which were separately assessed to the rates for the relief of the poor in every year for six or seven years now last past, during which last-mentioned period there have been various changes in the occupations and rateable value of such houses and tenements. Many valuable messuages, tenements, and premises, which were, during all or some parts of the years in which the said old alleged outstanding debts were in the manner stated accruing, chargeable with the poor-rates, and of which the occupiers were, during such years or parts of years, liable in common with other occupiers of premises within the said Union to be rated and assessed to the poor-rates of the several parishes comprised therein, and were well able so to contribute rateably, and did in fact contribute, towards the payment of the expenses in respect of which the said old alleged outstanding debts accrued, were, during all the period between the 17th of February, 1857, and the 29th of September, 1857, pulled down and unoccupied, and not rateable or assessable to the poor-rates, or liable so to contribute: and many persons have become the occupiers of tenements within the said parish or Union since the said old outstanding debts respectively accrued and became due, who would not have been liable to contribute to the expenses in respect of which such debts accrued by virtue of any poor-rates made previously to the *397] 17th of February, 1857; and such persons are now *liable to be respectively assessed to the poor-rates of parishes comprised in the said Union, and will thus be liable to contribute towards the payment of such old outstanding debts, if the said call or order of 17th February, 1857, is a valid and legal order enforceable for the amount for which it is made.

For the purposes of this case the debts outstanding at Christmas, 1856, are to be taken as properly incurred and unpaid.

The Court of Queen's Bench gave judgment that the order was a valid and enforceable one. After much consideration, we cannot concur in that judgment.

The original legal authority to make a rate for the relief of the poor is the statute 43 Eliz. c. 2; which enacts that the churchwardens and overseers of a parish shall, with the consent of two justices, raise, weekly or otherwise, by taxation, a competent sum for the relief of the lame and other poor, and for putting out the poor children apprentices. Upon the construction of this statute, it has been uniformly held that the power of taxation under it can be exercised to meet prospective expenses only, and that it is not lawful to make a poor-rate for the payment of a past debt. Judges of the greatest eminence have not only approved of this construction as correct in itself, but have stated that

in their opinion this construction is founded upon principles of policy and justice. Of policy, because it enables the poor law officers to deal for ready money and avoid contracting debts, thereby avoiding a great temptation to extravagance and waste. And of justice, because, so far as is possible, it casts upon the existing rate-payers the burthen of the poor for the time being, and protects them from one which ought to have been borne by their *predecessors: *Tawny's Case*, 2 Salk. 531; [*398 *Rex v. Wavell*, 1 Doug. 116; *Rex v. Churchwardens of Dursley*, 5 A. & E. 10 (E. C. L. R. vol. 31): and it may be observed that an Act of Parliament, 41 G. 3 (U. K.), c. 23, s. 9, seems to have been required to authorize a retrospective rate to be made for certain purposes therein particularly specified. This was also the rule of the common law. In *Farlar v. Chesterton*, 2 Moore, P. C. C. 330, (a) it was decided by the Judicial Committee of the Privy Council that a church-rate (a rate at common law) which included a sum for the payment of a debt previously contracted was unlawful, and vitiated the entire rate. In the judgment, it is stated that the rate, being made for a sum avowedly larger than would otherwise be necessary, with a view to enable the churchwardens out of the moneys levied to pay off the debts incurred in former years, was excessive and therefore illegal. The case *Rex v. The Chapelwardens of Haworth*, 12 East 556, is to the same effect. There is no doubt that the Legislature may authorize a rate for the payment of a past debt. An instance of this will be found in the case of *Harrison v. Stickney*, 2 H. L. Ca. 108, where it was decided that a drainage-rate to pay a debt previously incurred was legal. Lord Wensleydale, in delivering the opinion of the Judges, stated that the question depended upon the intention of the Legislature and the construction of the Act of Parliament; and that it was, Whether the Act under which the rate is made, either expressly or impliedly, prohibited a retrospective rate. The real question in the present case, therefore, *is, Whether, by [*399 the late poor law legislation, the law as to the making a poor-rate for the payment of past debts has been altered. And it was contended by the learned counsel for the defendants that such an alteration had been effected by an order of The Poor Law Commissioners, dated the 8th December, 1842, (b) called "The Consolidated Order," Articles 81 and 82 (page 44 of Mr. Glen's book).

To maintain this contention, two propositions must be established. First, that the Legislature has conferred upon The Poor Law Commissioners authority to make a rule or order authorizing The Board of Guardians to impose a charge for the payment of a past debt contracted for the ordinary relief of the poor, viz. for meat and bread for their sustenance; and, secondly, that they have exercised such authority. In our opinion neither proposition can be maintained.

The new Poor Law Act, 4 & 5 W. 4, c. 76, is the statute which authorized the appointment of The Poor Law Commissioners, and enabled parishes to be formed into Unions to be governed by Boards of Guardians: and the 42d section was what was relied upon by the learned counsel for the defendants, as authorizing The Poor Law Commissioners to make a rule authorizing The Board of Guardians to impose the present charge. It is quite clear that the 42d section gives no such power. It authorizes the Commissioners to make rules to be enforced at the

(a) See *Chesterton v. Farlar*, 1 Curt. Ecol. R. 345; 2 Curt. Ecol. R. 77.

(b) See ante, p. 304, note (a).

workhouse, for its government and preservation of good order, and as to the nature and amount of relief to be given, and the labour exacted from the poor: but there is nothing to be found in it giving any authority *400] to the Commissioners to authorize a charge to *be imposed to which the rate-payers were not previously liable. The principal authority of the Commissioners is given them by the 15th section, which confers upon them the direction and control of the administration of relief to the poor according to the existing laws, or such laws as shall be in force for the time being: and for executing these powers they are authorized to make and issue rules and orders: but no enactment was cited to us, nor have we met with one, which at all indicated that it was the intention of the Legislature to authorize The Poor Law Commissioners, either directly or by delegation to Boards of Guardians, to impose upon the rate-payers a charge for the payment of a debt previously contracted for the ordinary relief of the poor. The law upon this point seems to remain as before, without alteration.

Some sections were referred to in the various Acts of Parliament upon the subject, showing that it was contemplated that a debt might be due to the treasurer. We think any inference to be drawn from them is much too remote and weak to satisfy the well known settled rule of law, that every rate or charge upon the subject must be imposed by clear and unambiguous words: *Denn dem. Manifold v. Diamond*, 4 B. & C. 243, 245 (E. C. L. R. vol. 10); *Wroughton v. Turtle*, 11 M. & W. 561, 567.†

It was also pointed out that certain debts were specially recognised and provided for, viz. by the 24th and 25th sections of stat. 4 & 5 W. 4, c. 76. We think that any inference to be drawn from these provisions is rather against the power of the Poor Law Commissioners, or Board of Guardians, to authorize what would substantially be a retrospective rate. *401] It is the same *inference as that afforded by stat. 41 G. 3 (U. K.), c. 23, before referred to.

But, secondly, even supposing that the Poor Law Commissioners have power to make such a rule or order, we think they did not exercise it by the 81st and 82d Articles of the Consolidated Order. These articles are contained under the heading of "orders for contributions and payments." (a) By the 26th section of the Poor Law Act, after enabling parishes to be united into Unions, it is provided that, notwithstanding their union, each of the parishes shall be separately chargeable and liable to defray the expenses of their own poor. The 81st Article was obviously framed to meet the consequences of this enactment. It orders that the clerk of each Union shall, four weeks at least before the 25th March and 29th September, respectively, in each year, ascertain the cost to each parish in the Union for the maintenance of its poor and other separate charges, as well as for the common charges incurred in the half of the last year corresponding to the half year next coming, and shall estimate, and, as near as may be, divide amongst the parishes, any "extraordinary charges" to which the union may be liable in the coming half year, and shall then prepare the orders on the several parishes for the sums which upon such computations it shall appear necessary for them to contribute to the expenses of the Union for the coming half year: the clerk is therefore to ascertain, first, the cost to each parish for the maintenance

of its poor for a past period, which, by the 26th section, is a separate charge: 2dly, the other separate charges for the same period: 3dly, the *common charges, that is the charges, mentioned in the 28th section, which make up the common fund, such as for the building or repairing of the workhouse, the payment of the officers of the Union, and the other expenses to be incurred for the common use or on the common account of all the parishes: and, 4thly, he is to estimate and divide amongst the parishes *any extraordinary charges* to which the Union may be liable in the coming half year. We think that the "extraordinary charges" in the 81st Article are lawful charges other than the ordinary ones, and for which the parishes of the Union are bound by law to provide by the rates in order to comply with and give obedience to the order of the Guardians directed by the 82d Article, such as any charges specially imposed upon the rates for the payment of debts, or the interest of debts, or otherwise, and not charges for which a rate cannot be lawfully made. For instance, in the abstract of the items which make up the sum of 61,480*l.* (the amount to be raised by the rate upon all the parishes of the Union), the first is 2386*l.* 15*s.* 9*d.* due to the butcher for meat supplied from the 24th June, 1856, to the 27th December, 1856, and altogether there are items amounting to 23,000*l.* for debts due to tradesmen at Christmas, 1856. We have already stated that in our judgment a poor-rate cannot be lawfully made in 1857 to pay these debts: and we therefore think they are not "extraordinary charges" within the true meaning of the 81st Article. And in this we differ from the Court of Queen's Bench. The 82d Article seems to us to confirm our view upon this point. By it the Guardians are directed to make the order upon the proper authorities of the parish for the payment of such sum as may be required for the relief of the poor for the *con- tribution of the parish to the common fund of the Union, or for
 [*408
any other expenses chargeable by the Guardians on the parish, that is, legally chargeable: and, as we have already said, we think past debts are not so chargeable, and therefore could not be lawfully included in the account upon which the order of the 17th February, 1847, was founded.

For these reasons, we are of opinion that the aggregate sum of 61,480*l.*, imposed upon the entire Union (of which the sum of 2800*l.* ordered to be paid by the parish of St. Stephen Coleman Street was an aliquot part), was excessive; and, according to the case of *Farlar v. Chesterton*, 2 Moore, P. C. C. 330, the entire order was thereby rendered illegal. The order is to pay an entire sum of 2800*l.*: the parish authorities have no means of apportioning it.

Another argument also was addressed to us, to which much consideration is due. It was argued that, whatever the law might have been before the new Poor Law Act, the matter was now altered. Before then, the overseers of the poor were not a corporation: and, if they thought fit to contract debts, they were personally liable, and must themselves take the consequence: but that now the Guardians of the poor are corporations by virtue of stat. 5 & 6 W. 4, c. 69, s. 7, and were enabled to have and hold property, both real and personal, by virtue of stat. 5 & 6 Vict. c. 57, s. 16. That if their creditors sue them and obtain judgment, they can take the property of the corporation in execution, and sell it; which

*404] must be replaced by other property purchased *by funds obtained from prospective rates. That this might go on from time to time, by successive executions upon successively acquired property, until the entire debt of 27,200*l.* was levied: and that it would be therefore preferable to permit a rate to be made at once to pay these debts than have them levied by successive executions, probably extending over many years. We are not insensible to this argument: and, if the legal consequences be as surmised, there would undoubtedly be a very great evil. But we do not think that this, however great, would justify a Court of law in departing from the construction of the statute of Elizabeth which has been acted upon for upwards of 200 years. It is for the Legislature, and not a Court of law, to provide the remedy, if one be required. But the evil is not altogether on one side. There is possibly one quite as great upon the other. If the judgment of the Court of Queen's Bench be correct, the consequence would be that all Boards of Guardians in the kingdom might contract debts to any amount, and extending over any number of years (in the present case the debt for butcher's meat alone is 2336*l.*, and for bread and flour 3219*l.*). And, if their officers and servants who were intrusted with money wherewith to pay them then embezzled it, it would be competent for the Guardians to make orders upon the parishes and compel rate-payers who had already provided funds for the purpose to pay a second time: and not merely this; but compel individuals, who were not liable at all, nevertheless to provide funds and pay for the support and maintenance of poor for whom they were not by law liable to provide. This would be the inevitable consequence of the *judgment of the Court of Queen's

*405] Bench. And the portion of the case above set out exemplifies it. It was said that, upon a judgment being obtained against the Guardians, the Court of Queen's Bench would by mandamus compel the making a rate to pay it. We apprehend this is not so. The party obtaining the judgment would be left to the ordinary executions: and, if we are right in our view, the Court of Queen's Bench has no power to do so. It has no power to order the making an illegal rate. And we wish it to be distinctly understood that in this judgment we express no opinion as to the liability of the Board of Guardians to actions at the suit of the tradesmen, or that their property may be taken in execution upon judgments obtained against them.

Another objection was taken by the learned counsel for the parish of St. Stephen Coleman Street, which is also entitled to much consideration. The collector Manini was appointed by the Guardians, who, no doubt, represent the entire Union. But by an order of The Poor Law Board, dated 16th March, 1854, Article 6 (page 397 of Glen's Orders), the collector is every week to pay the moneys collected by him to the bankers whom the overseers may direct, to be placed to their account, or, if directed by one of the overseers, to the treasurer of the Guardians in payment of any order from such Guardians then due, or, in the absence of any such directions, shall pay the same to one of the overseers in person. And, in the event of the collector having at any time in the course of any week 50*l.* in his hands, he is to pay it over forth-

*406] with as above directed. It is stated in the case that Manini was ordered by the *Guardians to pay the amount collected by him

to the treasurer. This seems not to be in compliance with the above order.

The objection taken was, that it was the duty of the overseers of the nine parishes for which Manini was collector to have taken care that Manini complied with the 6th Article of the orders of the Poor Law Board of the 16th March, 1854; and that the loss consequent upon their default cannot lawfully be cast upon the other parishes of the Union. We think this objection entitled to great weight: but it becomes unnecessary to come to a decision on this point, as, for the reasons before given, we consider the call or order for the 2800*l.* upon the parish of St. Stephen Coleman Street invalid and not enforceable: and we cannot separate the good part from the bad: and, as it is bad in part, it is in our opinion bad altogether.

It is right to allude to some decisions, of which the cases of *Rex v. Carpenter*, 6 A. & E. 794 (E. C. L. R. vol. 33), and *Regina v. Read*, 13 Q. B. 524 (E. C. L. R. vol. 66), are instances. In the former case, under the authority of an Act of Parliament, a sum of money was borrowed and charged upon the poor-rates. The Court of Queen's Bench issued a mandamus commanding it to be paid. This no doubt was right. In fact, the Act of Parliament directly authorized a retrospective rate for the purpose of paying the debt. There are several cases of a similar kind to be found in the Reports. The case of *Regina v. Read* arose on the disallowance by an auditor of sums paid to an attorney for costs. We think that judgment is substantially in accordance with ours. It is *certainly no authority that a poor-rate can be made in 1857 for the payment of a butcher's bill contracted for the sustenance [*407 of the paupers in 1856; which is the real point in the present case. It was urged that the proper tribunal before whom the objection to the order was to be taken was the auditor. We, however, think that, upon the principle of the case of *Farlar v. Chesterton*, 2 Moore, P. C. C. 330, the order was void ab initio.

The judgment of the Court of Queen's Bench must therefore be reversed. And, in answer to the questions proposed in the case, we state:

First, that the call or order of the 17th February, 1857, is not valid or enforceable for the sum of 2800*l.* or any portion of it.

Secondly, that the parish officers of St. Stephen Coleman Street are not liable or bound in law to pay this sum or any portion of it *under this order*.

We direct that each party shall bear their own costs.

Judgment reversed.(a)

(a) See stat. 22 & 23 Vict. c. 49.

*The BOARD OF WORKS for The POPLAR DISTRICT, Appellants, and NICHOLAS KNIGHT and HENRY WEITZELL, Respondents. May 26. [*408

A wall had been erected from time immemorial on land adjacent to a tidal river; and it kept out from such land the river at high water, the land being drained into the river by drains at a considerable distance from the wall. Before stat. 18 & 19 Vict. c. 120 (Metropolis Local

Management Act), the wall was within the jurisdiction of The Metropolitan Commissioners of Sewers; and it was within a district mentioned in Schedule (B.) to that Act. K., the occupier of the land on which the wall stood, cut away part of the wall, and built houses thereon, without the consent and in violation of the express prohibition of The Board of Works of the District. The Board demolished the houses, reinstated the wall, and claimed the expenses from K.

Held that the wall was a sewer, and that The District Board was entitled to claim the expenses, under sects. 68, 204.

Also, that the board might recover the expenses under sect. 76, although no foundation for the houses had been dug out, but they were simply erected on the surface of the ground.

It appearing that K. had applied for permission to The District Board of Works, and had in his correspondence with them treated the matter as exclusively within their jurisdiction, and that The Metropolitan Board of Works had not interfered or exercised any jurisdiction over the wall: Held, that it was not competent to K. to resist the claim of The District Board on the supposed ground that the statute vested the wall in The Metropolitan Board of Works.

Admitted, that no claim could be sustained by The District Board for the expense of obtaining the advice of counsel.

THIS was a case stated for the opinion of this Court under stat. 20 & 21 Vict. c. 43. The statement was in substance as follows:

The appellants are a corporate body, and have a common seal, and are the Board of Works for the Poplar District, constituted under, and having certain powers conferred upon them by virtue of stat. 18 & 19 Vict. c. 120, "For the better local management of the Metropolis."

The respondents are the lessees of certain land situated in the Isle of Dogs, belonging to the Ironmongers' Company, and within the Poplar District of Works.

The marsh wall referred to in the case is an immemorial wall and *409] embankment of earth, within the limits *of the said district, which keeps back the waters of the Thames at high tide from the Isle of Dogs. The soil and freehold of that portion of the marsh wall, as to which questions have arisen between the appellants and respondents, is vested in the Ironmongers' Company. The marsh wall was, before the passing of stat. 18 & 19 Vict. c. 120, within the jurisdiction of The Metropolitan Commissioners of Sewers. The Metropolitan Board of Works have never exercised any jurisdiction over it.

On the eastern side of the Isle of Dogs are situated two main sewers, called respectively Great Sluice and Drunken Dock Sluice, which drain the whole of that part of the Isle south of the West India Dock Basin. These sewers pass through and under the marsh wall in their course to the Thames, one at a considerable distance to the east, the other at a considerable distance to the west, of that portion of the marsh wall which is the subject of dispute. These two sewers are referred to in schedule (D) to stat. 18 & 19 Vict. c. 120. These sewers have also attached to them four inlet sluices, used for the purpose of flushing, which inlet sluices pass under the marsh wall at various places; but all of them at a considerable distance from that portion of it which is the subject of dispute.

In September, 1856, the respondents addressed to the appellants the following letter:

"To the Board of Works for the Poplar District.

"Gentlemen, I forward you a plan for the erection of nine houses in Deptford Ferry Road, Mill Wall, and beg permission to cut away the bank of the river wall as per plan, six feet below the level of wall, and for a depth of seventy-four feet from the front wall of house. I

have *received permission for a similar purpose before, from the Commissioners of Sewers; and, as the houses in question will [*410 complete the block of property, it is essential that I should be allowed this application. The portion cut away will be two hundred feet from the river, and building intervening for the whole of that distance, so that in reality the wall is useless there. But I propose to maintain the said river wall by a five feet path, to the extent of my buildings as per plan. I am, gentlemen, your obedient servant, Pro WEITZELL & KNIGHT, NICHOLAS KNIGHT."

On 10th October, 1856, the appellants, by their clerk, returned the following answer:

"Board of Works for the Poplar District, East India Dock Road (E), Oct. 10, 1856.

"Gentlemen, I am directed by this board to acquaint you that they assent to your request to cut the marsh wall at the Deptford Ferry Road, as showed upon a plan presented by you to this board on the 16th September last, upon the following conditions: That such cutting be performed under the inspection and direction of our clerk of the works, and also the building of the retaining wall for the same: That you place gates in all walls and fences that intersect the said marsh wall for the extent of your property, with pass keys to the same for the free passage of this board along the said wall. I am, gentlemen, yours obdtly, CHAS. C. CEELY."

"Messrs. KNIGHT," &c.

In January, 1857, the appellants' surveyor reported to them, as the fact was, that the respondents had cut away thirty-two feet in length, eight feet in perpendicular depth, and thirty feet in breadth (the wall at this point being about sixty feet broad), of the said marsh *wall, [*411 in addition to the seventy-four feet for which leave had been granted to the respondents as aforesaid, and built a retaining wall of brick against the marsh wall for the entire length of this cutting including the thirty-two feet above mentioned, as well as the seventy-four feet above mentioned. Thereupon, on 7th January, 1857, the appellants served upon the respondents a notice in writing, of which the following is a copy:

"Board of Works for the Poplar District, East India Dock Road (E), January 7, 1857.

"Gentlemen, It having been reported to this board that you have cut away the marsh wall adjoining the Deptford Ferry Road to the extent of about thirty-two feet in length and about eight feet in depth beyond that authorized by this board in my letter of the 10th of October last, I am directed to inform you that this board have ordered that you forthwith reinstate the marsh wall so cut into to the satisfaction of the board or their clerk of the works; and, in default of which, the necessary proceedings will be taken against you. I am, gentlemen, yours obdtly., CHARLES C. CEELY, Clerk to the Board."

"Messrs. WEITZELL & KNIGHT," &c.

The respondents did not reinstate that portion of the said marsh wall so cut away by them as last aforesaid. And, on 29th January, 1857, they addressed to the appellants a letter of which the following is a copy.

"To the Metropolitan District Board of Works, Poplar.

"Ironmongers' Arms, January 26th, 1857.

"Gentlemen, We beg to apply to your honourable board for permission to cut into the Thames marsh wall *to the full extent of
*412] Messrs. Tindale's property, and in a line with the cutting which you kindly gave us permission for in October last. And we propose to build an eighteen inch wall against the cutting, with cross walls of some houses abutting on the same, so as to render the marsh wall perfectly safe, and to your satisfaction. A committee, having been appointed by you to examine the works, will be able to explain to you the tract, without our being obliged to get a plan to show the same. In reference to the gates on the wall, I beg to state we have had two new ones put; which will give the satisfaction required by your surveyor. We are, gentlemen, Yours obediently, WEITZELL & KNIGHT."

On 28th January, 1857, the appellants sent to the respondents an answer to the letter of 26th January; of which answer the following is a copy.

"Board of Works for the Poplar District.

"East India Dock Road (E), Jan. 28, 1857.

"Gentlemen, Your application for a further permission to cut the marsh wall has been considered by this board: and I am directed to inform you that they will require a plan showing precisely what it is you require, and what you propose to do: and, when this is properly presented, it will receive this Board's attention. In the meantime you will be held responsible for anything done by you without the authority of this board. I am, gentn., Yours obdltly., CHARLES C. CEELY, Clerk to the Board.

"Messrs. KNIGHT & WEITZELL," &c.

On 5th March, 1857, the appellants served the respondents with a notice of which the following is a copy.

*413] "To Nicholas Knight and John Henry Weitzell, of," &c.

"Whereas, on the 7th day of January last, notice was given to you by order and on behalf of The Board of Works for the Poplar District, that, it having been reported to the said board that you had cut away the marsh wall adjoining the Deptford Ferry Road, to the extent of about thirty-two feet in length and eight feet in depth beyond that authorized by the said board in my letter to you of the 10th of October last, and that the said board had ordered that you should then forthwith reinstate the said marsh wall so cut into to the satisfaction of the board or their clerk of the works; and, in default of which, the necessary proceedings would be taken against you: and whereas you have made default, and neglected to comply with such notice and order of the said board: Now I, the undersigned, clerk to the said Board of Works, do, by the order and authority and on behalf of the said board, hereby give you and each of you notice that the said board have determined and ordered, and hereby require you, within seven days from the service of this notice, to amend, remake, or reinstate the said marsh wall (so cut into by you) to the satisfaction of the said board or their clerk of the works. And, in case of your refusing or neglecting so to do, the said board will, immediately after the expiration of such seven days, cause the houses and buildings erected and built thereon by you or on your behalf, without notice given by you to the said board, and without the

consent of the said board, to be demolished, or altered, and to cause the said marsh wall to be amended or remade, as the case may require, and to recover the expenses thereof from you in the manner provided by the Act of *Parliament of the session holden," &c. (18 & 19 Vict. [*414 c. 120].

"Given under my hand this 5th day of March, 1857. CHARLES C. CEBLY, Clerk to The Board of Works for the Poplar District."

On 9th March, the respondents addressed a letter to the appellants, of which the following is a copy. It was accompanied by a plan, a copy of which was annexed to and formed part of this case.

"To The Metropolitan Board of Works, Poplar District.

"March 9, 1857.

"Gentlemen, We beg to submit to your honourable board a plan showing the cutting we made in the marsh wall adjoining Messrs. Tindale's factory in January last; and which was objected to in consequence of the same being done contrary to a plan previously accepted; and which cutting was done through mistake by us, as was then stated to you. And we trust, by the matter being properly investigated, that your honourable board will not withhold your consent to allow the said cutting to remain. And we hereby agree to build the necessary walls you may require. And we here beg to state that the wall belonging to Messrs. Tindale, and which was shown to your committee when on view, is at least eight feet deep, the greater portion of it built in stone. This wall is in front of our cutting next the Thames, as shown by the section of our plan. We further beg to state we have shown in the plan the line of six houses which we propose to build, and the proposed drainage thereof. Trusting this will be satisfactory to your honourable board, We remain, gentlemen, Yours respectfully, WEITZELL & KNIGHT."

On 12th March, 1857, the appellants, by their clerk, *sent the respondents a letter of which the following is a copy. [*415

"Gentlemen, Your application to this board under date the 9th March last, accompanied by a plan showing the cutting of the marsh wall next the Deptford Ferry Road, cut into by you without the sanction of this board, and also showing the plan of drainage of six houses, which you propose to build upon the site of the cutting, has been referred to the clerk of the works to report upon. In the meantime you are requested to stay all works pending the decision of this board upon the subject, and to consider this notice as given to you without prejudice to any of the former proceedings of this board in this matter."

The report of the clerk of the works referred to in the letter last set out was as follows.

"Board of Works for the Poplar District, All Saints, Poplar.

"Gentlemen, Pursuant to an order of the board on the 6th instant, I have to report upon the application of Messrs. Knight & Weitzell for building and drainage. The application refers to draining six houses situate at the rear of Betton's Terrace, West Ferry Road. With regard to the proposed mode of drainage, I can see no objection. But, as to the building, I have to inform the board that two of the said houses are about to be built on the site of the marsh wall, which was cut away by the applicants without the consent of the board, and a defective brick wall was substituted. On the 18th instant, I had an opening made to ascertain the depth of the boundary wall of Tindale's Dock; and I

found it to be about nine feet below the surface, and nearly level with the foundation of the proposed houses. Should the *board grant
 *416] the application, I would recommend that the following conditions be complied with, that is to say: The existing wall should be taken down and rebuilt with good stock bricks and Roman cement (in accordance with the accompanying plan and section), and well backed up with concrete. If the work recommended be properly executed, it will meet all the requirements of the case.

“R. PARKER, Clerk of Works, 17th March, 1857.”

On 17th March, 1857, the appellants came to the following resolution.

“Resolved: That the report of the clerk of the works be not approved, and that Messrs. Knight and Weitzell be called upon to reinstate the marsh wall forthwith to the satisfaction and under the superintendence of the clerk of the works.”

On 18th March, 1857, the appellants, by their clerk, sent the following letter to the respondents.

“Gentlemen, I am directed by the board to inform you that they have considered your application, bearing date the 9th of March instant, accompanied by a plan, for permission to cut the marsh wall at the Deptford Ferry Road, and for the building and drainage of houses upon the site of the said wall. And I am directed to inform you that this board will not allow the said cutting, and have ordered you to reinstate the marsh wall in pursuance of the notice served upon you to that effect on the 5th instant, forthwith.”

Early in April, 1857, the respondents built four houses, in respect of which no question arises; and which are still standing. In the first week in May, 1857, the respondents began to build two other houses: one of which was completed as far as concerned the carcase, the other
 *417] *was scarcely begun, by the 28th of the same month. No works of any kind were done by the respondents in respect of these two houses before the first week in May, 1857, except the building of the retaining wall hereinbefore mentioned; which retaining wall was intended to act as the outside wall of the second house if it had ever been completed, and was constructed with buttresses, and, in other respects, so as to serve that purpose. The entire site of the incomplete house, and the greatest part of the site of the completed one, was on the ground which had been occupied by the portion of the marsh wall removed by the respondents without leave from the appellants as hereinbefore mentioned.

The four houses still standing are drained, and the two houses removed by the appellants were intended to be drained, by drains running into a sewer under the jurisdiction of the appellants.

In building these last two houses, however, so far as they were built, no foundations were laid or dug out; nor was any part of the same built over any sewer whatever, unless the marsh wall hereinbefore described be a sewer.

On 12th May, 1857, the appellants served the respondents with a notice of which the following is a copy.

“To Nicholas Knight and John Henry Weitzell,” &c.

“Whereas default has been made by you in giving seven days’ notice in writing to the Board of Works for the Poplar District before begin-

ning to lay and dig out the foundations of certain new houses and buildings lately erected and built, and begun to be erected and built, by you, in or near to West Ferry Road and Deptford Ferry Road within the parish of All Saints Poplar in the county of Middlesex, and within the jurisdiction *of the said board, and certain houses and buildings have been there built and erected, and begun to be built [*418 and erected, by you, contrary to the orders made and notified to you by the said board; all which things are in breach and violation of a certain Act," &c. (18 & 19 Vict. c. 120): "And whereas you have, without the consent of the said Board of Works for the Poplar District, broken and cut away a large part of a certain sewer commonly called the marsh wall of Poplar, which is vested in the said board, and have not, within fourteen days after notice in writing by the said board, caused the said sewer to be reinstated in conformity with the directions of the said board: And whereas you have, without the consent first obtained in writing of the said Board of Works for the Poplar District, erected certain buildings in and near West Ferry Road and Deptford Ferry Road aforesaid, in and over a certain sewer commonly called the marsh wall of Poplar, which is vested in the said board: And whereas you have, either wilfully or carelessly and accidentally, damaged certain property vested in the said Board of Works for the Poplar District, namely the sewer commonly called the marsh wall of Poplar: Now take notice that, unless you shall in the meantime have reinstated the said marsh wall, and otherwise complied with the terms and requisitions of the Act aforesaid, and with the orders of the said board, and with the notice and directions already given to you by the said board, the said Board of Works for the Poplar District will, at and after the end and expiration of fourteen days from the day of the date and service hereof, namely on Thursday the 28th of this present May, at six o'clock in the forenoon, by themselves, their agents, officers, servants, workmen and *others, proceed to demolish, and cause to be demolished, and [*419 will then actually begin to demolish, the said houses and buildings so erected and built, and begun to be erected and built, by you, in or near West Ferry Road and Deptford Ferry Road aforesaid, and in, over, and adjoining to the same marsh wall; and that they will forthwith afterwards proceed to recover from you the expenses which shall be thereby incurred, and the amount necessary to make good the damage done by you to the said sewer commonly called the marsh wall of Poplar, and to reinstate the same. Dated this 12th day of May in the year of our Lord 1857.

"By order of the Board of Works for the Poplar District.

"CHARLES C. CEELY, Clerk to the said Board."

On the 14th May, the respondents sent to the appellants a letter, of which the following is a copy:—

"Gentlemen, having received a notice from your clerk, dated May 12, stating that it is your intention to demolish some of our houses now building on our ground, situate in the West Ferry Road, Poplar, we beg to be allowed to appeal once more to your honourable board, and hope you will consider more favourably our position in the matter. In the first place, we wish again to explain most sincerely that the cutting which you complain of was not done intentionally, but in error. That being done, gentlemen, it is impossible to reinstate the marsh wall

exactly as it was before without a most serious expense; and, if done, would be a source of great damage to our houses, as the rise of water from the surface in wet weather is great, and would settle against the houses next the bank. Should you think there is any danger by our cutting, we shall be most *willing to build a wall of any strength of bricks and cement you may think sufficient to order, so as to render the marsh wall stronger than it was before. We further beg to state that we pay a heavy rent for the ground for building on, but do not wish to do anything against the wishes of your board, or that is unlawful. We again beg that you will consider the matter, and trust that there can be no necessity for any unpleasant means to be used. Waiting your pleasure, we are," &c.

On 19th May, 1857, the respondents were informed that the notice of the appellants given to the respondents upon 12th May, 1857, and hereinbefore set out, would be acted upon.

On 28th May, 1857, the appellants entered upon, and took down, so much of the last two houses hereinbefore mentioned as had then been built, as well as the said retaining wall intended to form the outside wall of one of them when completed, so far as the said retaining wall stood upon the thirty-two feet of the marsh wall before mentioned, and reinstated the said thirty-two feet of the marsh wall which had been removed by the respondents without the leave of the appellants, as hereinbefore mentioned. On 22d August, 1857, the respondents were served by the appellants with a summons, of which the following is a copy:—

“Metropolitan Police District, to wit.	}	“To Nicholas Knight and John Henry Weitzell, of West Ferry Road, in the parish of All Saints Poplar, in the county of Middlesex.
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“Whereas, complaint hath this day been made before the undersigned, one of the magistrates of the Police Courts of the metropolis, sitting at the Thames Police Court at Stepney, within the Metropolitan Police

*District: For that you have made default in giving seven days' notice in writing to the Board of Works for the Poplar District, before beginning to lay and dig out the foundations of certain new houses and buildings lately begun to be erected and built by you in or near to West Ferry Road and Deptford Ferry Road, within the parish of All Saints Poplar, in the county of Middlesex, within the jurisdiction of the said board; and did begin to build and erect there certain houses and buildings, contrary to the orders made and notified to you by the said board: And further, that without the consent of the said Board of Works, you have broken into, and cut and carried away a large part of a certain sewer in the said parish which is vested in the said Board of Works, and have refused and neglected to reinstate the said sewer in conformity with the directions of the said board: And further, that without the consent of the said Board of Works, you have erected houses and buildings over a sewer vested in the said board contrary to the statute in that case made and provided: Whereupon the said District Board of Works have caused the said houses and buildings to be demolished, and the connected works to be relaid, amended, and remade, and the said sewer to be reinstated, and have, in so doing, incurred expenses to the amount of 42l. 16s., which you have thereupon become liable to repay to them, and have not repaid: These are therefore to command

you, in Her Majesty's name, to be and appear on Wednesday, the 21st day of August, instant, at 12 o'clock at noon, at the Thames Police Court at Stepney, before the Police Magistrate of the Metropolis then sitting there, to answer to the same complaint, and to be further dealt with according to law.

"Given under my hand and seal, this 20th day of *August, [*422 in the year of our Lord 1857, at the Police Court aforesaid.

(Signed) "WILLIAM CORRIE." [L. S.]

The respondents attended at the Thames Police Court at Stepney, before the Police Magistrate of the Metropolis then sitting there, in obedience to the said summons.

The appellants claimed to be reimbursed in the sum of 26*l.* 9*s.* 8*d.*; 5*l.* 5*s.* 6*d.*, part thereof, being the expense incurred by them in the pulling down the said two houses; and 21*l.* 14*s.* 2*d.* being the expense incurred by them in reinstating the portion of the said marsh wall so removed as aforesaid by the respondents. They also claimed to be reimbursed in the sum of 16*l.* 6*s.* 4*d.* for obtaining the advice of counsel. They referred the magistrate to sections 68, 76, and 204 of stat. 18 & 19 Vict. c. 120, as those on which they relied.

The respondents, on the other hand, contended: first, that, by sect. 135 of stat. 18 & 19 Vict. c. 120, all the powers, rights, and other matters, and all property in the sewers, walls, &c., situated in the said Isle of Dogs, including the said marsh wall, had vested in The Metropolitan Board of Works; and, secondly, that, even if the 68th section of the said Act gives any property or rights over the said wall to the appellants, they, the respondents, had not done anything which justified the interference of the appellants within the meaning of any of the sections of the said Act: and that, consequently, they were not bound to repay any of the expenses alleged to have been incurred by the appellants as aforesaid.

The magistrate decided that the appellants could recover from the respondents neither of the sums so claimed; and that, although in his opinion the said *marsh wall was vested in the appellants, and [*423 they might in his judgment legally enter to abate an encroachment on it, yet, as the entry made by them was not in pursuance of sects. 76, 83, or 204, or of any other sections of the said Act, whereby he was authorized to order the repayment of the said expenses so incurred, such expenses could not be recovered on summons before him. He accordingly dismissed the complaint, with costs, and awarded the sum of 4*l.* 2*s.*, as costs, to be paid by the appellants to the respondents.

The case especially referred the Court to sects. 68, 69, 76, 83, 135, 145, 148, 204, 222, 225, 226, 227; and concluded as follows:

If the Court of Queen's Bench shall be of opinion that the magistrate's decision was right, his order is to be confirmed. If the Court shall be of opinion that the magistrate's decision was wrong, the Court shall make such order thereon as to them shall seem fit.

The case was argued in last Term.(a)

Hugh Hill, for the respondents.—The claim appears to be made under sects. 68, 69, 76, and 204, of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. Sect. 68 vests in the District Board (with exceptions not here applicable) all sewers vested in the Metropolitan

(a) May 1st, 1858. Before Lord Campbell, C. J., and Erle and Crompton, J.

Commissioners of Sewers, within the districts mentioned, as this district is, in schedule (B), including, by reference to the earlier part of the section, "the walls, defences, banks," &c., "works, and things thereunto appertaining." Sect. 69 directs that the District Board shall maintain and repair the sewers vested in them, and cause to be made, *424] repaired, and maintained such *sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their district. Now "sewer," by the interpretation clause, sect. 250, "shall mean and include sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies;" where the interpretation of "drain," referred to as previously given in sect. 250, relates merely to the drainings of a single building and premises within the curtilage. Sect. 76 enacts that, "before beginning to lay or dig out the foundation of any new house or building," or "to rebuild" the same, and before making any drain for the purpose of draining directly or indirectly into any sewer in the jurisdiction of the board, there shall be given seven days' notice to the board; and every such foundation must be laid so as to permit the drainage of the house or building in compliance with the Act, and as the board shall order: and, if the house or building or drain be made contrary to the Act or any order of the board, the board may cause it to be demolished, cause the drain to be remade, and recover the expenses from the owner. Sect. 83 may perhaps be relied upon. [*Huddleston*, for the appellants, stated that he should not rely on sect. 83.] Sect. 204 enacts that "No building shall be erected in, over, or under any sewer vested in the Metropolitan Board of Works, or in any vestry or district board, without their consent first obtained in writing, and if any building be erected contrary to this provision, the board or vestry in whom such sewer is vested may demolish the same, and the expenses incurred thereby shall be paid by the person erecting such building." The question, therefore, if the claim be based on sects. 68, 69, and 204, appears to be, whether this marsh wall be a sewer within the meaning *425] of the Act. *Now sect. 250 clearly treats a "sewer" as something capable of being, or being connected with, a drain. And, in sect. 68, "walls" as well as "banks," are spoken of as distinct from "sewers." An enactment like this, imposing a charge on the subject, must be construed strictly. In *Tinkler v. Wandsworth District Board of Works*, 2 De G. & J. 261, 274, Lord Justice Turner cautioned the board that it was their bounden duty to keep strictly within the powers intrusted to them by this Act, and not to be guided by any fancied view of the spirit of the Act. A wall can surely not be called a sewer without doing great violence to language. [Lord CAMPBELL, C. J.—I do not see that a sewer may not be a structure elevated above the surface of the land.] It must be effective for draining, not merely as this wall is, for protection. [ERLE, J.—When land is below the high-water mark a raised bank very commonly is effective for draining.] Structures of that sort are, as has been shown, denominated "walls" and "banks." Sect. 205 contains enactments against sweeping, &c., soil, rubbish, or filth into any "sewer or drain;" a provision entirely inapplicable to a wall. Then, as to sect. 76, the case finds that no foundations were built or dug out for the two houses; therefore the notice clause is inapplicable, and the section does not affect the case. Further,

under sect. 135 and Schedule (D), which specifies Great Sluice and Drunken Dock Sluice, the wall and the houses in question are vested in The Metropolitan Board of Works, which has not interfered. As to the quantum, the claim for repayment of the fees to counsel cannot be sustained.

Huddleston, contrà.—The claim last mentioned is not *pressed. [426 Sect. 68 vests this sewer, if it be one, in the appellants, the district being mentioned in Schedule (B). There is no ground for the argument that sect. 135 vests the sewer in the Metropolitan Board of Works. Schedule (D), indeed, does mention Great Sluice and Drunken Dock Sluice; but the case shows that those sewers are “at a considerable distance” from the wall in question. Indeed, it would be sufficient for the appellants to rely upon the fact that the case does not affirmatively show the wall to be vested in The Metropolitan Board of Works. If a wall, serving as this does for the drainage, is not within the meaning of “sewer” in sect. 68, the most essential part of the drainage structure is omitted. The term “drainage” does not occur in the old Acts relating to sewage: the more common terms there are “defences” and “protections.” Ancient walls, serviceable for sewage, were always under the care of the Commissioners, as appears, for instance, in *The Case of the Isle of Ely*, 10 Rep. 141 a, 142 b.(a) As to the argument, on sect. 76, that the case shows no foundations to have been built or dug out: sect. 76 is not confined to excavated foundations, or foundations built; a builder may “lay” the foundation of a house on the ground which he finds. [COLERIDGE, to whom the case had been referred, to be *more fully [427 stated, informed the Court that the houses had been built from the surface found; and that the statement in the case meant only that there were no foundations sunk or made in the ordinary sense of the word.]

Hugh Hill, in reply.—The language of sect. 76 seems to refer only to foundations so sunk or made. By sect. 135 the Legislature clearly meant to vest in the Metropolitan Board of Works the walls belonging to the main sewers so vested: and, in the finding of this case, the wall in question does belong to the sewers named in Schedule (D.), if it can be considered part of the sewage works at all. [Lord CAMPBELL, C. J.—I think we must take it, at any rate, that the District Board is in possession, The Metropolitan Board of Works not having interfered.]

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

In this case The District Board had caused certain houses belonging to the respondents to be demolished, and had caused a portion of the marsh wall removed by the respondents to be reinstated, and had claimed 5*l.* 5*s.* 6*d.* and 2*l.* 1*s.* 2*d.* as the expenses of these operations.

(a) Mr. Toulmin Smith, in his edition of *The Metropolis Local Management Act, &c.*, (London, 1867), expresses the opinion that the word “sewer” properly means a “sea-fence, a protection against sea tides, whatever its construction,” deriving the word from *saewær*, and that this meaning prevailed at common law, and in the earlier legislation. See Introduction, p. 16, &c., and notes (68), (69: 1), (69: 3), (70), (135: 1), (135: 5). Spelman, in his *Glossarium*, thus defines *Sewera*, et *Sewera*: “Est fossa in locis palustribus ducta ad aquas eliciendas, to *eue* dicimus, cum aqua clam elabatur, quod a Gall. *euer*, i. *eudare*, a quo *eueur*, i. *eudor*, et *eudator*, *euerie*, *eudatio*. Ab his Galli laticem et lacrimas, quæ ex vite et arboribus profluunt *eueu* nuncupant.” See the charter cited by him.

And the question upon this appeal is, Whether they can sustain that claim, either under sect. 204 or sect. 76 of their Act.

By sect. 204 the board have this right in respect of any "building" "erected in, over, or under any sewer" vested in them.

*428] The respondents had cut away part of the marsh wall, *and built thereon; so that, under this section, the point is, Whether the marsh wall was a sewer within its meaning.

The wall, according to the case, keeps back the river Thames at high water from inundating the Isle of Dogs. It is therefore essential to the drainage of the level, quite as much so as the channel which actually drains the Isle of Dogs at low water: both form one apparatus: and, if either was lost, the level would be uninhabitable. And thus, from its nature, it seems to us to be part of the sewers of the level. Also the Legislature uses the term sewers in this sense. By sect. 68 the sewers, with the *walls, banks*, outlets, and sluices thereunto appertaining, are vested in The District Board. The walls and banks are here named to appertain to a sewer, as much as outlets and sluices. Sect. 69 commands The District Board to repair the sewers; and, among the repairs, they are commanded to cause to be maintained such sewers and works as may be necessary for draining the district, and further to cause all banks and defences adjoining any river to be repaired where it may be necessary for effectually draining or protecting from floods the district. Here, again, banks and defences are classed under the term "sewer:" and the marsh wall is a bank and defence within this section, and so a sewer.

If we regard the protection conferred by sect. 204, it seems more necessary for a bank or wall fending back the high water than for a gutter or drain carrying off the low water, inasmuch as the inundation from high water might be more suddenly and widely destructive than the gradual rise of one drain. No reason is assigned why the Legislature should give summary powers *for preventing obstruction of
*429] a sewer drain, and leave a sewer bank liable to be undermined by foundations or encumbered with superstructures.

Sect. 205 was relied on for the respondents as showing that "sewer" meant a *drain* and did not mean a *wall* or *bank*: but it seems to lead to the opposite conclusion. "Sewer" in its general sense may mean the whole apparatus, and in its specific sense a drain as part of that apparatus. Sect. 205 prohibits, among other things, sweeping rubbish into a sewer or a grate communicating with a sewer. Here the context shows that the specific sense is meant; and, accordingly, every time sewer is mentioned, the words "or drain" are added, as showing its meaning in this section. The expression "sewer or drain" occurs four times in four lines in this section: but the word "sewer" stands alone for the most part in other parts of the Act.

A point was made, which is rather of form than of substance, viz. that the property and power over the marsh wall was in The Metropolitan Board of Works, and not in the District Board. To this our answer is that the statute is not definite on the point: and, for the purpose of the present appeal, it is not necessary to scan the statute as it would be if the Metropolitan Board of Works was in conflict with The District Board. If that question should be raised between those parties, it is probable there may be further evidence tending to its elucidation.

tion: but we decide the present appeal in favour of the appellants on this point, because it is stated on the case that The Metropolitan Board of Works has never exercised any jurisdiction over it; and the case shows that the District Board *de facto* is in the exercise of that jurisdiction: and, as against the *respondent, his letters are abundant evidence to prove that he treated with The District Board as [*430 having the jurisdiction, and now resorts to the point of form to evade a judgment on the merits.

If it was necessary for the appellants to claim under sect. 76, it seems to us to support their claim. It was said that the respondents had neither dug out nor laid any foundation, but placed their houses on the ground without a foundation in its ordinary sense. But we are of opinion that all houses stand on a foundation within the meaning of this Act: and the Legislature appears to us to have expressly provided for houses standing on foundations placed on the surface, as the enactment is, "before beginning to lay or dig out the foundation of any new house." It seems to have contemplated that some foundations would be laid without any digging out: and, if the respondents had no other answer to the appellants' claim on the 76th section, our judgment would be against them on this point also.

The claim for fees to counsel on advising The District Board was properly given up on the argument.

We are therefore of opinion that the magistrate's decision was wrong: and, in pursuance of the power mentioned at the end of the case, we order that the respondents pay to the appellants 5*l.* 5*s.* 6*d.* and 21*l.* 14*s.* 2*d.*, and the costs of this appeal, that is, the costs of the paper-books and argument.

My brother Crompton is not satisfied with the conclusion at which we have arrived, and particularly doubts whether the wall in question is a "sewer" within the meaning of either the 204th or 205th section.

Order for payment accordingly.

*ELLIS and FICKLING, Appellants, v. PEARCE, Respondent. [*431
May 27.

Under sects. 3 and 71 of The Passengers Act, 1855 (18 & 19 Vict. c. 119), a sailing ship is not a passenger ship because she carries more than thirty passengers, or more than one statute adult passenger to every fifty tons, if that number or proportion is not made up without reckoning cabin passengers; and, where persons are cabin passengers in all respects except that of having received contract tickets in the form in Schedule (K.), which in its terms applies to passenger ships only, such persons, for the purpose of estimating the number or proportion, are to be reckoned as cabin passengers; and unless, without including them, the number or proportion is not made up, the ship is not a passenger ship.

THIS was a case stated, under stat. 20 & 21 Vict. c. 43, substantially as follows.

The respondent complained against the appellants before two justices of the city of London (the Lord Mayor and an alderman), for a breach of sect. 51 of The Passengers Act, 1855 (18 & 19 Vict. c. 119): and the justices, upon the hearing, ordered the appellants to pay to the

respondent, 120*l.*, by way of passage-money, and the further sum of 5*l.* 5*s.* for costs and charges, and adjudged that, if the several sums were not paid forthwith, the appellants should be severally imprisoned for two months unless the same should be sooner paid.

At the hearing of the aforesaid complaint, it was proved, on the part of the complainant, the respondent in this appeal, that he engaged, in this city, with the appellants, who are shipbrokers, for a passage for himself, wife, son, and daughter, in the ship *Windsor*, to go to Melbourne in Australia. That he paid the appellants for such passage 30*l.* each, viz., 120*l.* That no contract ticket was furnished to him. That the said ship commenced her voyage on the 5th November, 1857. That, after the commencement of her voyage, to wit, on the 1st of December, 1857, the ship was wrecked near the Cape de Verde Islands. That the *432] ship carried on her *voyage twenty-nine statute adult passengers, and one person under the age of twelve years, twenty-one of whom messed throughout the voyage at the same table with the master of the ship, amongst whom was the respondent; (a) and that the registered tonnage of the ship, which was propelled by sails, was 677 tons, or thereabouts.

It was proved, on the part of the defendants, the appellants in this appeal, that the assistant emigration officers of the port of London had inspected the ship in the ordinary way. That, on such inspection, he found six steerage passengers who alone had contract tickets. And he thereupon passed the ship as not being a passenger ship; and therefore did not require the provisions of The Passengers Act, 1855, to be complied with. And that no contract tickets were furnished to the cabin passengers.

It was contended, on the part of the appellants, that the ship was not a passenger ship within the meaning of the 3d section of the Passengers Act, 1855. For, although, judging by the tonnage and number of the passengers only, it might be so considered, yet, inasmuch as "passengers" and "passages," there mentioned, are not to include cabin passengers or cabin passages, but others, and as there were, deducting the twenty-one cabin passengers, only nine passengers, being a less number than in proportion of one statute adult to every fifty tons of the registered tonnage, the ship in question was not a passenger ship; and, that *433] being so, no *contract ticket was necessary for any description of the passengers in the ship; and that therefore the appellants were not liable under the 51st section of the Act.

But it was contended, on the part of the respondent, that the respondent and the other cabin passengers on board the ship were not cabin passengers within the meaning of the term "passengers" in the third section of the Act; inasmuch as the respondent, and the other cabin passengers, had not been furnished with a duly signed contract ticket according to the form required by the Act. And that, as the ship carried upon the voyage twenty-nine passengers (the word "passengers," in counting the number to be carried, being intended to mean all descriptions of passengers), being a greater number of passengers than in the proportion of one statute adult to every fifty tons of the

(a) It was, by agreement of counsel, assumed on the argument that all the conditions necessary to constitute a cabin passenger, under sect. 3, were fulfilled, except that of the delivery of a contract ticket in the form in Schedule (K.).

registered tonnage of the ship, it was a passenger ship within the meaning of the said Act; and so the appellants were liable under the 51st section of the same Act.

The case added: "We, however, being of opinion that the evidence given before us brought the case within the operation of the said 51st section of The Passengers Act, 1855, gave our determination against the appellants in the manner before stated.

"The question of law arising on the above statement, therefore, is Whether the said ship Windsor was a passenger ship within the meaning of the aforesaid Act."

The case was argued in last Term.(a)

Wilde, for the appellants.—The 51st section applies only in the case of a passenger ship. This was not a *passenger ship within the meaning of the Act. It may be taken, as a general principle in [*434 construing the Act, that the provisions are introduced for the protection of the poorer class of emigrants. This appears strongly, for instance, in sect. 6, giving the office of Emigration Commissioners to the Commissioners previously appointed for "superintending the emigration of the poorer classes of Her Majesty's subjects;" from the dietary scale at sect. 35; from the summary process of enforcing the claims under sect. 51, afterwards detailed in the 84th and following sections. By the interpretation clause, sect. 3, "the expression 'passenger ship' shall signify every description of such ship carrying upon any voyage to which the provisions of this Act shall extend more than thirty passengers, or a greater number of passengers than in the proportion of one statute adult" (defined earlier) "to every fifty tons of the registered tonnage of such ship if propelled by sails, or of one statute adult to every twenty-five tons if propelled by steam." Then, by an earlier part of the section, "the expression 'passage' shall include all passages except cabin passages; the expression 'passengers' shall include all passengers except cabin passengers," and certain labourers, "and no persons shall be deemed cabin passengers unless the space allotted to their exclusive use shall be in the proportion of at least thirty-six clear superficial feet to each statute adult, nor unless they shall be messed throughout the voyage at the same table with the master or first officer of the ship, nor unless the fare contracted to be paid by them respectively shall be in the proportion of at least thirty shillings for every week of the length of the voyage as computed under the provisions of this Act for sailing vessels *proceeding from the United Kingdom to any place south of the equator, and of twenty shillings for such vessels proceeding to [*435 any place north of the equator, nor unless they shall have been furnished with a duly signed contract ticket according to the form in schedule (K.) of this Act." Now here, if the twenty-one passengers who messed with the captain were cabin passengers, there were not "passengers," as defined, enough to make up the number of thirty, or the proportion of one statute adult to every fifty tons, and the ship was not a passenger ship; if the twenty-one were not cabin passengers, the number of "passengers" was sufficient to make the ship a passenger ship. The respondent will admit that the twenty-one were cabin passengers, except for the fact of their not having been furnished with a contract ticket in the form in the schedule (K.). The question therefore is, whether, a

(a) April 24th, 1858. Before Lord Campbell, C. J., Erle and Crompton, J.

ship being otherwise not a passenger ship, and the parties being otherwise cabin passengers, the non-delivery of the ticket converts the ship into a passenger ship and prevents the parties from being cabin passengers. That this is not so is plain from the form of the contract ticket in schedule (K.), which, by its terms, is applicable only to the case of a passenger ship; and the same is true of the counterpart. So that, according to the argument of the respondent, a ship, circumstanced as this was as to passengers, would fail to be a passenger ship by that being done which can be done only on the supposition that she is a passenger ship; and must be a passenger ship by that not being done the doing of which is impossible unless she is a passenger ship: her character is to be determined by an act which cannot take place except upon the *436] assumption that her character is determined without *the act. The real meaning of the section is shown by sect. 71, which prescribes that, in the case of "a passage in any ship, or of a cabin passage in any 'Passenger Ship,'" contract tickets shall be given: in the former case according to the form in Schedule (L.); in the latter according to the form in Schedule (K.). Unless therefore the ship be in other respects a "Passenger Ship," no contract ticket in the form in Schedule (K.) is necessary to the cabin passengers. How could it be said that a ship was not a passenger ship for want of that being done which, if done, would not make her a passenger ship? It never can have been intended to convert a ship conveying cabin passengers only into a "Passenger Ship."

Atherton, contra.—The words of the statute are plain. The test of a ship being a "Passenger Ship" is the number of passengers not having contract tickets in the form in Schedule (K.), or the proportion which the number of such passengers bears to the tonnage. The contract ticket is matter of substance: sect. 73 limits the damages and costs recoverable for breach of contract to the passage-money in the contract ticket and twenty pounds. [ERLE, J.—Many ships sail without any steerage passengers: does the person receiving money from the passengers incur the penalties under sect. 71 for not delivering contract tickets in the form in Schedule (K.), if the number exceed the proportion named? And is he liable to them at the suit of emigration officers, under sect. 84?] That may be the result of the definitions in the statute. The different sections of the Act show the necessity of adhering to the definitions. Sect. 51 applies to "passengers" only in passenger *437] ships; sects. 52, 53, *to both "passengers" and "cabin passengers" in such ships. It is true that there may be cabin passengers in a ship which is not a passenger ship.

Wilde, in reply.—That the ship should be a passenger ship is a condition precedent to the necessity of delivering a contract ticket in the form in Schedule (K.). *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

In this case two magistrates had made an order, under the 51st section of stat. 18 & 19 Vict. c. 119, for the return of passage-money. And the only question submitted for our consideration was, Whether the ship mentioned in the case was under the circumstances a passenger ship within the provisions of the above statute.

The ship had sailed with nine steerage passengers, and with twenty-one passengers who messed with the officers, and had the superficial

space; and were to pay the weekly fare, required by the statute to constitute cabin passengers, but who had received no contract tickets. If these twenty-one persons were to be counted as "passengers" with reference to the character of the vessel, there would have been a greater number of passengers than in the proportion of one statute adult to every fifty tons; and the vessel would have been a passenger ship: if they were not to be so counted, the ship would not have been a passenger ship. This raises a difficult question on the construction of the statute.

The interpretation clause, taken by itself, seems strongly in favour of the construction by which these twenty-one persons are to be counted as not cabin *passengers, so as to make the number such as would constitute the ship a passenger ship within the provisions of the [*438 Act. The 3d section, the interpretation clause, enacts that particular expressions shall have particular meanings for the purposes of the Act, "if not inconsistent with the context or subject-matter." The word "passage" is there defined to mean all passages except cabin passages, and the word "passengers" all passengers except cabin passengers: and it is then stated that no persons shall be deemed cabin passengers unless they mess, and have the superficial space, and are to pay the fare per week, as mentioned in the Act, nor unless they shall have been furnished with a duly signed contract ticket according to the form in Schedule (K.) of the Act. It is then enacted that the expression "Passenger Ship" shall signify every description of ship, &c., carrying, &c., more than thirty passengers, or a greater number of passengers in proportion to the tonnage than mentioned in the Act.

The twenty-one passengers in question seem at first sight excluded from the category of cabin passengers by the express terms of the Act. And therefore, being passengers other than cabin passengers, they would seem to be "passengers" to make up the number which is, with reference to the amount of tonnage, to regulate the character of the ship. On looking however to the 71st section of the Act, which requires the furnishing of the contract tickets, we find two kinds of cabin passengers contemplated: one, a cabin passenger in a passenger ship; and the other, a cabin passenger in a non-passenger ship. And it is to the first class of cabin passengers only that a contract ticket is to be given. To steerage passengers a contract ticket is to be given, whether their passage is engaged in a passenger or a *non-passenger ship. It seems very strange to say that the character of the ship, as a passenger or non-passenger ship, shall [*439 depend on the giving a contract ticket to persons otherwise cabin passengers, whereas, by the same Act of Parliament, it is only to cabin passengers in passenger ships that the contract ticket is to be given. On this construction, the character of the ship would have to be determined by something which was not to be done unless she had the particular character of a passenger ship. It may therefore be argued that the provision, as to parties not being to be deemed cabin passengers unless they have contract tickets (K.), would be inapplicable to and inconsistent with that purpose of the Act which is for the regulation of the character of the ship according to the number of persons not being cabin passengers in cases where, the ship not being otherwise a passenger ship, such passengers would not be required to have contract tickets furnished to them. And it may be said that the interpretation clause

only requires that there should be such tickets where the vessel was otherwise a passenger ship, and where such contract for cabin passengers in a passenger ship would be required; and that the provision for the parties having contract tickets (K.) before they were deemed cabin passengers did not extend to make such contract tickets necessary for the purpose of excluding them from being counted as steerage passengers in computing the numbers with reference to the thirty-one passengers, or with regard to the proportion of passengers to the tonnage. It would seem strange to require such tickets to be given for the purpose of making the ship a non-passenger ship where they could not be required by the Act, and would be altogether inapplicable according to the *statute, the moment they were given, and the ship thereby made

*440] a non-passenger ship. Another difficulty arises from the consideration that, when the passage is engaged and any money is paid, the ticket (K.) is to be given, if it is in a passenger ship; and that, when the money is paid and the passage engaged as in the present case, as far at least as relates to the earlier cabin passengers, the owners were perfectly correct in giving no contract ticket. They had then made their engagement binding between them and the cabin passengers: and it seems strange to compel them, by reason of the altered state of facts, to give tickets not required at the time of engaging the passage, and the giving of which would appear nugatory; as, the moment they were given in a case like the present, the ship would become a non-passenger ship for a cabin passage in which tickets would not be necessary.

The present case is the same in effect as if there were no steerage passengers, and as if, ex. gr., fifty passengers, with the requisite space, messing, and fare, had taken their passage, intending to be cabin passengers in a ship not intended to be a passenger ship, nor so fitted out. In such case, according to the argument for the respondent, the ship would be a passenger ship till contract tickets were given, and, when these tickets were given, the ship would eo instanti cease to be a passenger ship, and would remain a non-passenger ship for a passage in which the tickets would not be required under sect. 71. On such a construction no ship could sail with thirty-one cabin passengers without going through the ceremony of giving contract tickets (K.), which they clearly are not intended to have furnished to them under the provisions of the 71st section.

*We, therefore, think that the safest construction is to hold

*441] that the provision in the interpretation clause, as to the having tickets (K.), only applies in the case of a passenger ship; and that it is inapplicable for the purpose of counting as steerage passengers persons not having tickets, but being cabin passengers in other respects. On this construction, the clause should be read "nor unless" [*in the case of passenger ships*] "they have the contract ticket (K.)." This does not seem an overstrained construction, as the reference to the form (K.) shows that the Legislature speaks of cabin passengers in passenger vessels to whom alone that provision is applicable; and the provision would have sufficient operation as requiring that, in the case of passenger ships, no passenger should be deemed a cabin passenger unless he had the contract ticket (K.).

Upon the whole, we are not satisfied that persons in the position of the twenty-one persons in the present case are to be deemed "passen-

gers" for the purpose of being counted as such in determining the character of the ship.

We think, therefore, that the conviction was wrong, and that our judgment should be for the appellants.

Judgment for the appellants.

*WILLIAM PAIN BEECHAM and RICHARD SMITH v. HENRY TILDEN SMITH. *May 28.* [*442]

Action by A. and B., payees of a joint and several promissory note, against C., one of the makers. Plea, that the said note was made (setting it out) by B., one of the plaintiffs, the defendant, and another: and that the defendant, in case the plaintiffs were to recover from him in that action the amount of the said note, would be entitled to call on B. for contribution.

On demurrer, held a bad plea, as being no answer to the action upon the several contract by C. *Seemle*, per Lord Campbell, C. J., that, even if the plea had been good, a replication, averring that the plaintiffs made the said note only as sureties for third parties, would have been a good answer.

THE declaration stated that defendant, on 11th December, 1852, by his promissory note, now overdue, promised to pay to plaintiff 1000*l.* on demand, with interest for the same at 4*l.* per cent. per annum from the date thereof. Breach: Non-payment.

Pleas: 1, as to one-third of plaintiffs' claim. "That the promissory note in the declaration mentioned was and is a promissory note made by the plaintiff Richard Smith, the defendant, and one Tilden Smith, and was and is in the words and figures following, that is to say:

'£1000

'Battle, 11th Decr., 1852.

'On demand we jointly and severally promise to pay to William Pain Beecham and Richard Smith, or order, the sum of 1000*l.* for value received, with interest for the same at 4*l.* per cent. per annum from the date hereof.

'HENRY TILDEN SMITH,

'TILDEN SMITH,

'RICHARD SMITH.'

And the defendant saith that the said Richard Smith, in the said note mentioned as one of the payees thereof, and as one of the makers thereof, was and is the plaintiff Richard Smith: and the said note, at the time it was made, was one upon and by virtue whereof the defendant, in case he paid the same, or more than one-third *part thereof, would be [*443 entitled to call upon the plaintiff Richard Smith to pay and to recover from him contribution. And the defendant further saith that, by reason of the premises, in case the plaintiffs were to recover from him in this action the amount of the said promissory note and interest, he, the defendant, would be entitled to sue for and recover from the plaintiff Richard Smith one-third part of the amount so recovered from him, the defendant."

2, as to the residue of the declaration. A similar plea.

Demurrer to both pleas. Joinder.

Replication (first), to both pleas. That the plaintiffs issued their writ in this action against the defendant alone, and upon and in respect only of his several liability upon the said promissory note, and not otherwise

or as one of the joint makers of the said note. And the plaintiffs say that the said promissory note was made and given to the plaintiffs only as and being trustees for third persons, as the said makers then well knew, and not for or in respect of any debt, claim, or demand by the said plaintiffs on the said makers of the said note or either of them due to or claimable by the plaintiffs, or either of them, in their or his personal right.

Demurrer. Joinder.

Lush, for the plaintiffs.—The pleas are bad. If the note were simply a joint note, the plaintiffs could not sue: but where a contract is both joint and several, as here, it may be treated as either, at the option of the holder. And therefore, as was observed by the Court in giving judgment in *King v. Hoare*, 13 M. & W. 494, 505,† such a note may be *444] considered as representing three several notes; in this case, *one by the defendant, one by the plaintiff, Richard Smith, and one by a third party. The note by the plaintiff, Richard Smith, would be no answer to an action by him and the other plaintiff against the defendant upon the first. The argument, therefore, that the plaintiff, if he recovered, would be liable to contribute, does not apply. In all the cases in which that argument has been adopted, and which will probably be cited on the other side, such as *Moffatt v. Van Millingen*, (a) and *Teague v. Hubbard*, 8 B. & C. 345 (E. C. L. R. vol. 15), the defendant was liable only jointly. [COLERIDGE, J.—The note here is joint as well as several. Do you contend that the defendant here would have no claim for contribution?] Not against the parties who are joint plaintiffs in this action: there is therefore no circuity of action, which arises only where there is liability to contribution between the same parties, according to the principle laid down in note (k) to *Turner v. Davies*, 2 Wms. Saund. 150 a, and in *Walmesley v. Cooper*, 11 A. & E. 216 (E. C. L. R. vol. 39).

Further, the replication is good. The fact that the plaintiffs are suing as trustees is a legal answer to a defence founded upon an alleged personal liability on their part.

Bovill, for the defendants.—The pleas are good. The note is a contract between the plaintiffs on the one hand, and one of the plaintiffs, the defendant, and a third party, on the other: and the plaintiffs cannot at law recover against one of themselves connected with others: *Bosanquet v. Wray*, 6 Taunt. 597 (E. C. L. R. vol. 1); *Neale v. Turton*, 4 Bing. 149 (E. C. L. R. vol. 13). The defence to the plaintiffs' claim *445] rests on the general *principle, and not upon any objection on the ground of circuity of action. [Lord CAMPBELL, C. J.—In the two cases last cited the action was upon a joint contract. CROMPTON, J.—The contract here may in equity be good only as a joint contract, and yet good at law as a several contract.] In *Richards v. Richards*, 2 B. & Ad. 447, 451 (E. C. L. R. vol. 22), it was allowed that a married woman, payee of a note drawn by her husband and two others, could not, in his lifetime, sue upon the note, inasmuch as she would have to join her husband as plaintiff against himself and others, though it was decided that she might sue after his death. Yet there the note was joint and several. In *Wallace v. Kelsall*, 7 M. & W. 264,† it was held that accord and satisfaction with one of three plaintiffs might be pleaded

(a) Note (c) to *Mainwaring v. Newman*, 2 B. & P. 124.

as a defence to a claim by all the three; on the general principle, commented on in 2 Williams on Executors, p. 1180 (5th ed.), that a release by one of several joint creditors is a release by all. Here, the liability of one of the plaintiffs to be sued by the defendant in respect of the instrument declared upon operates in the same way as a release by such plaintiff, and extinguishes his right.

Further, the replication is bad. *Gibson v. Winter*, 5 B. & Ad. 96 (E. C. L. R. vol. 27), decides that, where a trustee sues at law as a plaintiff, he must be treated in all respects as a party to the cause, and that a defence against him is a defence against the cestui que trust suing in his name.

Lush, in reply.—There is no analogy between the present case and *Wallace v. Kelsall*. There the claim was a joint claim only; and the decision rested *on the well known principle, as stated in Wil- [*446
liams on Executors, that a discharge of a debtor by one of several joint creditors is a discharge of all. In *Richards v. Richards*, 2 B. & Ad. 447 (E. C. L. R. vol. 22), the ground given by the Court for their opinion that the wife could not have sued, in her husband's lifetime, upon the note made jointly and severally by him and others, was that, if she had recovered, her husband, whose sureties the other makers were, and she, would have been liable to a cross-action by them for the repayment of the money so recovered: so that there would have been a circuity of action. Here no such difficulty (a technical difficulty only, as was observed by Lord Tenterden in giving judgment) exists.

Lord CAMPBELL, C. J.—I am of opinion that the pleas are bad. This is an action brought upon the promise by the defendant contained in the promissory note made jointly and severally by himself and two others, one of those two others being one of the plaintiffs. The contract sued upon is the several contract of the defendant; and the fact, that there is also, upon the same instrument, a joint contract by the three makers, is no defence. The cases cited on the other side are all of them distinguishable. Even if the pleas had been good, I think the replication would have been an answer.

COLERIDGE, J.—I am of the same opinion. The counsel for the defendant has very properly given up any argument founded upon the policy of avoiding circuity of action. That argument might be material, if there were only one plaintiff here, and he the maker of the *promissory note. But, practically, there are three promissory [*447
notes signed by three different parties; and the note declared on is not that signed by the plaintiff, Richard Smith, but that signed by the defendant. Upon that note the plaintiffs have an undoubted right of action.

ERLE, J.—Two plaintiffs sue one of the makers of a joint and several promissory note. The pleas set up that the note is joint and several, and that one of the plaintiffs is a maker of the *joint* note. But the several note here sued upon is a note made by the defendant, to which that plaintiff is not a party. The pleas, therefore, are no answer to the action.

CROMPTON, J.—As a joint contract, this note, undoubtedly, would not be enforceable at law. But the plaintiffs are at liberty to sue on it as a several note by any of the makers. The defendant who is so sued is not at liberty to claim to have the note treated as a joint note. The

argument, that the plaintiff would be liable to contribution, has been rightly met by the answer that the contribution would not be by the same parties as those suing. I had some doubt, at first, whether *Richards v. Richards*, 2 B. & Ad. 447 (E. C. L. R. vol. 22), was not an authority in favour of the pleas, as having decided that the contract there could not be enforced as a several contract, because it was also a joint contract. But, upon looking into the case, I see that it was decided on quite a different ground, and does not affect the present case.

Judgment for the plaintiffs.

***448] *JOHN PEARSON and HENRY HAMPTON v. JOHN DAWSON. May 28.**

A. purchased from D. certain goods, lying at D.'s bonded warehouse under the charge of D.'s warehouse keeper, and entered at the Custom House in D.'s name; A. paid D. by bills at three months. On the same day A. sold part of the goods, still lying at D.'s warehouse, to P., and gave him a delivery order on D. for specific goods. D., on receiving it, placed it on the file, and (unknown to P.) put P.'s name, as purchaser, opposite the entry of the specified goods in the sale book, in which he had originally entered A.'s name as purchaser. P. afterwards, on several occasions, gave to D. delivery orders for portions of the goods. D. thereupon signed a delivery order to his warehouse keeper, and those portions were delivered to P., he paying the duty. Without a delivery order by D. and payment of duties, the goods would not be delivered from the warehouse.

A. afterwards, and before the bills given by him were due, became insolvent; and the bills were dishonoured. D. refused to deliver the remainder of the goods to P., alleging that he was entitled to detain them till A.'s debt to him was paid.

Held, that he had no such right: that, by accepting the delivery order given by A. to P., without giving notice to P. of any contingent claim upon the goods in respect of A., D. must be held to have recognised P. as entitled to the absolute right in the property and the possession of the goods, and could not, as against P., set up any subsequent claim in respect of A.

THIS was a special case, stated by order of Crompton, J.

The material parts were as follows.

On 15th May, 1857, defendant, a merchant in Whitehaven, consignee of a cargo of sugar from Jamaica, per *Orontes*, had a sale of the sugar at his warehouse.

The terms of payment of sales of sugar at Whitehaven are either cash, in which case discount is allowed, or bills at three months.

At the sale in question Mr. Askew, a grocer in Whitehaven, purchased the whole of the sugars ex *The Orontes* which had not been previously sold, including the twenty hogsheads hereinafter mentioned; and he gave his own acceptances at three months to the defendant for the purchase-money. Samples of the sugars so purchased by Mr. Askew were then delivered to him by the defendant.

The defendant, in accordance with his usual practice in such cases, entered in a book kept by him for the purpose, and called "*The Sugar Book*," the different sales effected on the occasion in question, with the

***449]** *names of the respective purchasers written in ink opposite to the parcels of sugar which had been sold to them respectively.

After the sale, and on the day it took place, the plaintiffs purchased of Askew for 72*l.* 5*s.* 7*d.* twenty of the hogsheads of sugar which the latter had purchased at the sale of the defendant: and on the following

day they gave Askew their bill at three months for the amount. This bill was immediately endorsed for value by Askew, and has since been paid by the plaintiffs. Askew, on the resale of the twenty hogsheads, gave the plaintiffs the samples of them he had received from the defendant, and also a delivery order for them upon the defendant, of which the following is a copy.

"Mr. John Dawson.

"Please deliver to Messrs. Pearson & Hampton, or order, 20 hogsheads of sugar ex Orontes."

[Here followed the trade-marks of the parcels.]

"Whitehaven, 15th May, 1857.

"JAMES ASKEW."

This order was handed by the plaintiffs to the defendant on 18th May, 1857; on receipt whereof the defendant, in accordance with his usual practice in such cases, placed it on his file, and wrote in pencil in the said book called "The Sugar Book" (but this was not known to the plaintiffs) the name of the plaintiffs' firm, viz. "Pearson & Hampton," opposite the particular hogsheads of sugar which had so been resold to them by Askew, and which the defendant had so entered in the said book as sold to Askew. This book, with the entries so made in it, was kept by the defendant, to enable him to ascertain readily, and without referring to the *file, to whom the different hogsheads of sugar [*450 were deliverable.

The warehouse in which the sugars were kept was a bonded warehouse, double locked, the key of one of the locks being kept by the locker of the Custom House, and the key of the other by the defendant's warehouse-keeper.

At the time of the sale all the sugars were in the defendant's warehouse, under the charge of his warehouse-keeper, who is in his service, and stood in defendant's own name at the Custom House and so remained.

It is not the practice for the officers of customs to notice any change of ownership. They retain their control over the goods until the duty is paid, after which they leave it to the warehouse-keeper to deliver the goods to the person entitled to them. Any original purchaser or sub-purchaser, who required a hogshead to be delivered to him, had to obtain an order in writing, signed by the defendant, addressed to his warehouse-keeper, to deliver the hogshead; and on presenting the order so signed the hogshead would be delivered accordingly, if the duty had been paid: and without such an order no purchaser could obtain the delivery of a single hogshead. The duty would have been so paid by the plaintiffs, if the defendant could have given them a delivery order.

At the same time that the plaintiffs handed to the defendant, on 18th May, 1857, Askew's delivery order as before mentioned, they also handed to him a delivery order of their own for two of the hogsheads so resold to them by Askew. The following is a copy of the last-mentioned order.

"* Whitehaven, 18th May, 1857.

"Please deliver 2 hogsheads of sugar Ex Orontes, 9th May, [*451 1857."

[Here followed the trade-marks of the parcels.]

"Per pro Pearson & Hampton,

"A. GRAHAM."

Upon the presentation of this order the defendant signed and delivered to the plaintiffs the usual order to his warehouse-keeper for the delivery to the plaintiffs of the two hogsheads mentioned in their order upon himself: and thereupon the plaintiffs paid the duty on these hogsheads; and they were delivered to the plaintiffs.

On subsequent days, viz. on the 20th, 22d, 23d, and 27th May, 1857, and also on 2d June in the same year, similar orders to that of the 18th May above set forth were presented by the plaintiffs to the defendant for the delivery to them of other hogsheads of the sugar so resold to them by Askew; and all these orders were complied with in like manner, and the sugars mentioned in them were delivered to the plaintiffs, in the same way as the two hogsheads mentioned in the aforesaid order of 18th May. In this way eight out of the twenty hogsheads of sugar so resold to the plaintiffs have been delivered to the plaintiffs.

On 2d June, 1857, Askew became insolvent, and stopped payment, and, on 4th July, 1857, executed a deed for winding up his estate for the benefit of his creditors under inspection. At the time of his so becoming insolvent and stopping payment, twelve of the twenty hogsheads purchased of him by the plaintiffs as aforesaid still remained undelivered in the defendant's warehouse; and defendant, claiming a lien upon them for the amount of the purchase-money due for them *452] to him from Askew, declined to deliver them to the plaintiffs.

The acceptances given by Askew to the defendant for the sugars purchased by him at the sale have been dishonoured, and are now in the hands of the defendant wholly unpaid.

The Court is to be at liberty to draw any inference from the facts as stated above which a jury might draw therefrom.

The original book above referred to and the entries therein may be referred to by either party on the argument of this case.

The question for the opinion of the Court is, Whether the plaintiffs are entitled to recover from the defendant the value, less the duty, of the twelve hogsheads so remaining undelivered in the defendant's warehouse under the circumstances above stated.

Manisty, for the plaintiffs.—The defendant has no lien upon the goods. There has been, practically, a delivery of them by him to the plaintiffs; and he must therefore be considered as holding the goods only as their bailee. Askew, the first vendee, had, immediately upon the sale to him, a right either to take away the goods, or, as he did, to sell them to the plaintiffs and hand them over the delivery order. This delivery order was handed over by the plaintiffs to the defendant, who thereupon entered the name of the plaintiffs in his book, opposite the goods, as being the parties to whom they were deliverable. It is true that this entry was not communicated by him to the plaintiffs; but they had a right to assume, in the absence of any express repudiation by the *453] defendant, that he acknowledged them as the owners. The handing over of the delivery order would be sufficient, without any actual transfer in the defendant's books: *Harman v. Anderson*, 2 Campb. 243. But, further, the defendant acknowledged and acted on several successive delivery orders given by the plaintiffs, in respect of part of the goods. This is direct evidence that the defendant attorned, so to speak, to the plaintiffs. [CROMPTON, J.—There are several cases in which it has been decided that a part delivery of the goods, under

such circumstances, would not destroy the lien of the first vendor, unless it could be shown that such delivery was meant as part delivery of the whole.] Here it was clearly meant to be so; for the defendant, upon Askew's delivery order for the whole being handed over to him by the plaintiffs, unequivocally adopted them as the parties to whom the whole was to be delivered. That is sufficient, as was considered in *Dixon v. Bovill*, 3 Macq. Rep. H. L. 1, 18, to destroy the right of the first vendor to stop in transitu. *McEwan v. Smith*, 2 H. L. C. 309, will probably be relied upon by the other side. But there, although a delivery order was given by the vendor to the first vendee, it was never given or communicated to the warehouse-keeper. And in that case there were no other circumstances, as here, to show an adoption of the second vendee as owner. Here the first vendor has, before the insolvency of the first vendee, done every act by which he could sanction the sale by such first vendee to a third party: the first vendor's right, therefore, as against the first vendee, to stop in transitu, is gone. *Hawes v. Watson*, 2 B. & C. 540 (E. C. L. R. vol. 9), is an authority for the plaintiffs. In the judgments in *that case the question is discussed at some [*454 length, and the authorities reviewed.

Wilde, for the defendant.—It is true that, if a vendee in actual possession of the goods, either by himself or the warehouse-keeper, gives to a second vendee a delivery order which is subsequently adopted and acknowledged, either by the first vendee or the warehouse-keeper respectively, the right to possession of the goods is transferred to that second vendee. That is clear from *Harman v. Anderson*, 2 Campb. 242. But here the goods are, from first to last, in the possession of the first vendor. After Askew had bought the goods, he was, no doubt, entitled to take possession of them whenever he demanded it. But he never did demand it; so that, as far as regards him, the goods were still in the possession of the defendant. Then, Askew, by giving the delivery order to the plaintiffs, transferred to them the right to demand possession. But they did not demand it. [CROMPTON, J.—They gave delivery orders for part by virtue of the original delivery order; and the defendant acted on them.] That would not destroy the defendant's right, upon Askew's insolvency, to stop in transitu what was still undelivered, and in his actual possession, as an unpaid vendor. In the cases which have been cited for the plaintiffs the first vendor had parted with the actual possession to the first vendee. Here he has not, except as to part: and, though he may, by acting on the delivery orders with respect to part, have acknowledged the right of the plaintiffs eventually to have possession, when they chose to claim it, of what remained, he did not thereby transfer *the actual possession to them. *Dixon v. Yates*, 5 B. & Ad. 313 (E. C. L. R. vol. 27), shows that a delivery of [*455 part does not operate as a constructive delivery of the whole, although it is made with the intention that it should so operate. [Lord CAMPBELL, C. J.—Do you say that, if the first vendor has acknowledged the title of the second vendee, he has still a lien as against the first vendee?] Yes, if he has not parted with the actual possession of that upon which he claims a lien: *Dixon v. Yates*. Here the remainder of the goods were at the Custom House in the defendant's name. [Lord CAMPBELL, C. J.—That is merely a technical possession.] *McEwan v. Smith*, 2 H. L. C. 309, shows what the real effect of a delivery order

is; and that a mere agreement to deliver does not transfer the possession. *Townley v. Crump*, 4 A. & E. 58 (E. C. L. R. vol. 31), is to the same effect. [ERLE, J.—The defendant would have, at the best, only a contingent lien, dependent upon the bill being dishonoured.] The lien is suspended until then. [CROMPTON, J.—The right would hardly be a right of lien at all: it would be something analogous to a right to stop in transitu.]

Manisty, in reply.—The argument advanced for the defendant is in direct opposition to the established cases. [Lord CAMPBELL, C. J.—Is there any case in which the original vendor was his own warehouse-keeper?] That was so in *Townley v. Crump*. [Lord CAMPBELL, C. J.—There the vendor expressly recognised the title of the vendee.] There are many cases, as was observed by Bayley, J., in giving judgment in *Hawes v. Watson*, 2 B. & C. 540 (E. C. L. R. vol. 9), showing that such recognition may be by implication, so as to destroy the right *456] to stop in transitu: *Stoveld v. Hughes*, 14 East 308, is there cited as an authority on that point. And that case also shows that, if the first vendee acknowledge the title of the second vendee, whether he transfer to him the actual possession or not, the original vendor has no longer the right to stop in transitu as against the first vendee. *Whitehouse v. Frost*, 12 East 614,^(a) is to the same effect. In *Townley v. Crump*, the agreement to deliver was between the first vendor and the first vendee; and this distinction was noticed by the Court in giving judgment.

Lord CAMPBELL, C. J.—I am of opinion that the plaintiffs are entitled to recover. I take it to be established by the authorities that, if a delivery order is lodged with the warehouse-keeper, and he accepts it, he becomes the agent of the vendee who lodges it, and cannot contest his title, or claim a lien upon the goods. Were this otherwise, commerce could not be safely or successfully carried on. Here the goods were in the actual possession of the defendant, being at a bonded warehouse in his name. The plaintiffs purchase from Askew, and lodge the delivery order, given by him to them, with the defendant. The defendant makes no observation at the time, and therefore leads the plaintiffs to believe that he holds for them, and that they may claim the goods at any time. At that time he had no lien against Askew: but, if he meant to reserve his contingent right of lien, he should have expressly signified such reservation when the delivery order was lodged. In the absence of any such statement, the state of things is practically as if the defendant had expressly said to the plaintiffs, "I accept the delivery *457] order, and hold the goods for you." He does not add, "but I have a lien upon them in respect of Askew," or any words to that effect; and therefore leads them to suppose that he has no lien upon the goods. If the plaintiffs had been aware that he had such a lien, they would have taken away the goods, so as to prevent them from being detained by the defendant. The title of the purchaser being once acknowledged by the warehouse-man, the purchaser has a right to treat the warehouse-man as his agent; and the latter cannot afterwards set up a right in respect of a third party. The right claimed by the defendant is analogous to a right of stoppage in transitu; and, as to that, there are many cases in which it has been decided that, after the first

(a) See *Swanwick v. Sothorn*, 9 A. & E. 895.

vendor has parted with the possession of the goods to the second vendee, and acknowledged his title, he cannot afterwards stop them in transitu on account of any claim against the first vendee.

COLERIDGE, J.—It is of material importance not to break in upon the effect which has always been given to delivery orders: and, construing this delivery order upon the usual principle, I think it amounted to a substitution of the plaintiffs in Askew's rights. Now, what were his rights? He had, at that time, the right to the possession of the goods; and the defendant's claim of lien had not yet arisen. Then, by accepting the delivery order handed over to him by the plaintiffs, the defendant holds the goods for them as he did before for Askew, but with this difference, that, as the plaintiffs had paid for the goods, and Askew had not, the defendant had no contingent lien in respect of the plaintiffs, as he had in respect of Askew while he held for him, and the plaintiffs had an absolute right to the possession, unclogged with any right to lien on the part of the defendant. He *could not keep alive any lien [*458 against Askew without express notice to the plaintiffs: and he gave no such notice: indeed, if he had, it is clear that the plaintiffs would not have left the goods with him.

ERLE, J.—I am of the same opinion. Some ambiguity has crept in, in the course of the argument, as to the word "possession." The defendant's sale to Askew was an absolute sale, whether the goods were paid for in ready money or by a bill. Askew then acquired the right of property in the goods; and the defendant's possession was as much the possession of Askew as if the goods had been in the keeping of Askew's servant. No doubt the defendant had still a *contingent* right, analogous to a right of stoppage in transitu, to hold back the goods if Askew should, before obtaining possession of them, become insolvent. But, before any such right arose, Askew parted with his right of property and his right of possession to the plaintiffs; and the defendant's right of lien had been destroyed by his having acknowledged the right of property and the right of possession to have passed from Askew to the plaintiffs. No express recognition of the plaintiffs' title was made: but the defendant's conduct amounts to a recognition; and the plaintiffs parted with their money on that understanding. Under these circumstances, the defendant has no right to say to the plaintiff, "You shall pay me the debt due from Askew."

My brother Crompton (a) authorizes me to say that he concurs with the rest of the Court. Judgment for the plaintiffs. (b)

(a) Crompton, J., had left the Court in the course of the argument.

(b) See Blackburn's Treatise on the effect of the Contract of Sale, &c., Part III. c. 2, p. 224, &c.

*JURY v. BARKER. May 28.

[*459

"I promise to pay to J. S. or his order, at three months after date, the sum of 100*l*, as per memorandum of agreement. H. B."

Held, that a promissory note in this form was, on the face of it, an unconditional promise to pay, and was negotiable under stat. 3 & 4 Ann. c. 9.

If the effect of the agreement be to make the promise conditional, it is on the defendant to show that, by setting out the agreement in his plea.

ACTION by the endorsee of a promissory note against the maker.

Plea, to the first count (on the promissory note): That the supposed promissory note in that count mentioned was and is in the words and figures following, that is to say:

"London, 29th Oct. 1857.

"I promise to pay to Mr. J. C. Saunders or his order, at three months after date, the sum of one hundred pounds as per memorandum of agreement.

"HENRY JOHN BARKER.

"Payable at 105, Upper Thames Street, London."

Demurrer. Joinder.

O'Malley, for the plaintiff.—The defendant contends that the words "as per memorandum of agreement" destroy the negotiability of the instrument as a promissory note under stat. 3 & 4 Ann. c. 9. But that is not so: those words do not limit the absolute promise in writing, signed by the maker, to pay a certain sum to a certain person at a certain time: and that is all that the statute requires. The note here shows the existence of a prior agreement, and earmarks, as it were, the promissory note, so as to prevent the supposition that the payment is to be in respect of any other matter than the sum of money due under that agreement. But the note is still an absolute and unconditional promissory note. *460] **[Lord CAMPBELL, C. J.—The plea, to be good, should have set out the agreement, and shown that such agreement made the note conditional.]*

Raymond, for the defendant.—The instrument is not a promissory note within either the law of merchants or stat. 3 & 4 Ann. c. 9. It is not, upon the face of it, an unconditional promise to pay: the words "as per memorandum of agreement" are, at least, ambiguous, and might refer to some arrangement which would render the note valueless to endorsees. [*ERLE, J.—The words might mean only "as I agreed to do."*] But they might have another meaning, and one which would render the promise to pay conditional. The note must, on the face of it, be an absolute promise to pay.

Lord CAMPBELL, C. J.—The note here is an absolute and unconditional promise, as to the payer, the payee, the amount, and the date. If the addition of the words in question make the promise conditional, it is on the defendant to show that; and he has not done so.

COLERIDGE, J., and ERLE, J., concurred.(a)

Judgment for the plaintiff.

(a) *Crompton, J., was absent.*

A promissory note, according to its usual definition, must be an absolute and unconditioned undertaking to pay a sum certain at a fixed time. Any clause or provision in the note which precludes that certainty, destroys its negotiability; therefore a promise to pay in merchandise or articles of an uncertain value is not within the statute of Anna: *Clark v. King*, 2 Mass. 524; *Matthews v. Houghton*, 2 Fairf. Maine 377; *Leiber v. Goodrich*, 5 Cowen 186; *Gray v. Donahoe*, 4 Watts 400; *Irvine v. Lowry*, 14 Peters 293; *Young v. Adams*, 6 Mass. 182; *Whiteman v. Childress*, 6 Humph. 303; though this has been modified by statute in some of the states. So where the payment is to be made out of a particular fund: *Wordon v. Dodge*, 4 Denio 159; *Wig-*

gins v. Vaught, Cheves 91; *Smith v. Ellis*, 29 Maine 422; *Arnold v. Rock River, &c.*, R. R., 5 Duer 251.

Where, however, the additional words constitute a mere memorandum or refer to some collateral transaction, without destroying the absolute nature of the promise to pay, they will not affect the character of the note itself. Thus a note payable to S. or order on a certain day, "or when he completes the building according to contract," is negotiable: *Stevens v. Blunt*, 7 Mass. 740. So where a note given for the purchase of real estate had the words "*ne varietur*" written on it by the notary, it was held that its negotiability was not affected thereby, there being no evidence of any law or usage in that state to produce that result: *Fleckner v. Bank of U. S.*, 8 Wheaton 338; so a note promising to pay a certain sum "for rent of land," is not subject in the hands of a holder to an offset arising from a breach of an agreement to repair contained in the lease: *Evans v.*

Bell, 20 Alab. 509; so the addition of the words "for the hire of negroes during the present year" would not destroy the negotiability of a note: *Wallace v. Dyson*, 1 Speers 127; though it is otherwise where the note contains further stipulations, as to pay taxes, physicians' bills, or furnish clothing: *Ibid.*; *Barnes v. Gorman*, 9 Rich. 297. So a note for a certain sum, "which when paid will be in full of" a certain judgment, is good: *Ellet v. Borben*, 6 Texas 229; so the negotiability of a railroad note will not be affected, by a clause reciting that certain bonds had been deposited with a third person as collateral security for the note, with a provision for sale in case of default; *Arnold v. Rock River, &c.*, R. R., 5 Duer 207; and so of a note purporting to be in pursuance according to the provisions of a mortgage, it appearing that there was no inconsistency between the terms of the note and the mortgage: *Littlefield v. Hodge*, 6 Mich. 326.

***DE POTHONIER v. DE MATTOS. May 28. [*461**

Declaration by shipowner. upon a charter-party, for non-payment of freight by charterer, and on a common count for money payable for freight and on an account stated.

Pleas: 1. to first count, discharge of defendant by plaintiff before breach. 2, to residue of declaration. Payment. 3, (on equitable grounds) to whole declaration, parol release of plaintiff by defendant after cause of action accrued. Replications, on equitable grounds, to these pleas: That before cause of action accrued, and before release or discharge of defendant by plaintiff, or payment, all the right, title, and interest of plaintiff in the said ship, and in the said charter-party, was assigned to S., and then became, and are now, vested in him, of which defendant had notice before the alleged release or discharge of defendant by plaintiff, or payment: that plaintiff released and discharged defendant, and made the payment, without the authority, knowledge, or consent of S.; that the release and discharge were given by the plaintiff to defendant, and obtained by defendant from plaintiff, and the payment made, fraudulently, and with the intent to defraud S., and prevent him from recovering in respect of the said causes of action: and that the action was brought by S. in the name of plaintiff, on behalf of S.: that plaintiff had no interest in the said action, and that it had been commenced and carried on for the sole use and benefit, and at the sole expense and cost, of S.

On demurrer, held a good replication on equitable grounds, within sect. 85 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).

THE first count of the declaration set out a charter-party made between plaintiff and defendant, whereby plaintiff agreed that his ship, The *Bella Donna*, should proceed to a dock at Birkenhead with all con-

venient despatch, and there load coals and proceed to Constantinople and deliver the same for certain freight payable by the defendant as therein mentioned: that the ship did so proceed, load, and deliver: Breach: Non-payment.

The declaration also contained a common count for freight and money due on an account stated.

First plea, to the first count: That, before any breach, and before the goods had been loaded on board the ship, plaintiff, for good and sufficient considerations, exonerated and discharged defendant from the performance of the said agreement.

Third plea, to the residue of the declaration: That defendant, before action, satisfied and discharged plaintiff's claim by payment.

*462] Fifth plea, to the whole declaration, upon equitable *grounds: That after the accruing of the said causes of action, plaintiff, for good and sufficient considerations, released and discharged defendant, without deed under seal, from the said causes of action and all damages in respect thereof.

Replication, on equitable grounds, to the first plea: That after the execution of the said charter-party, and before any part of the said cargo was received or loaded on board the said ship, and before the accrual of the causes of action in that count mentioned, and before the plaintiff exonerated or discharged the defendant as in the first plea alleged, the said ship was, to wit, by bill of sale duly registered, lawfully and for good and sufficient considerations sold, transferred, and assigned by the plaintiff to one Salvesson; and all the right, title, and interest of the plaintiff to and in the said ship were then duly sold, transferred, assigned, and made over to the said S.; and all the right, title, and interest of the plaintiff to and in the said charter-party, and to and in the performance and fulfilment and benefit thereof, and the freight earned or payable or to be earned or payable under or by virtue of the same, then were duly and for good and sufficient consideration sold, transferred, assigned, and made over to, and then became and ever since have been wholly and absolutely vested in, the said S.: and the plaintiff then, and before he exonerated and discharged the defendant as in the first plea alleged, ceased to have any right or title to or interest in the said ship or charter-party, or the performance or fulfilment of the said charter-party, or the freight earned or payable or to be earned or payable under or by virtue of the same: of all which said several premises *463] respectively the defendant, before and at the time when the *said loading of the said cargo on board the said ship, as in the declaration mentioned, commenced, and before the plaintiff exonerated or discharged the defendant as in the said first plea alleged, had due and full notice and knowledge. And the plaintiff had no authority whatever to exonerate or discharge the defendant as in the said plea mentioned; and he exonerated and discharged the defendant as therein alleged without the authority, knowledge, consent, or concurrence of the said S.; and the said exoneration and discharge were given by the plaintiff to and obtained by the defendant from the plaintiff fraudulently and with intent to defraud the said S. and prevent him from recovering in respect of the causes of action in the first count mentioned, and obtaining satisfaction of his said claims and payment of the said balance of the said freight in the said first count mentioned and so due under and by virtue

of the said charter-party, and payable to him as aforesaid, as the defendant at the time when the plaintiff exonerated and discharged the defendant as in the first plea mentioned, well knew: and thereby the said supposed exoneration and discharge are void. And the plaintiff further says that this action is brought by the said S. in the name of the plaintiff for and on behalf of the said S. alone; and the plaintiff had not, when he so exonerated and discharged the defendant as in the first plea mentioned, any interest whatever in the said charter-party or the performance thereof, and has not, and never had, any interest whatever in the result of this action; and the same has been commenced and is carried on for the sole use and benefit, and at the sole cost and expense, of the said S.

There were similar replications, *mutatis mutandis*, to *the third plea and to the fifth plea (as to so much of each as related to the charge for freight), alleging an assignment of the freight to Salveson: and also to the fifth plea (so far as it related to the first count) a similar replication to that pleaded to the first plea.

Demurrer. Joinder.

Cleasby, for the defendant.—The equitable replications are bad. In the first place, they show on the face of them, collusion between the plaintiff and the defendant; and the replication to the third plea admits the fact that the plaintiff has been paid. The plaintiff cannot be permitted to set up his own fraud by way of answer to such plea of payment; and it is immaterial whether he be suing for himself or on behalf of another, as the Court can look only at the parties on the record: *Jones v. Yates*, 9 B. & C. 532 (E. C. L. R. vol. 17), *Gibson v. Winter*, 5 B. & Ad. 96. [Lord CAMPBELL, C. J.—Those cases were before the Act.] But, independently of the question of fraud, the fact that the action, though brought in the name of the nominal plaintiff, is really for the benefit of a third person, is not such an answer as can be set up under sect. 85 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). An equitable replication under that statute must be the replication of the plaintiff upon the record: here it is, practically, the replication of the person for whose benefit the action is brought. [COLERIDGE, J.—It is pleaded by the nominal plaintiff: does it not show an answer to the plea upon equitable grounds?] It sets up as an answer, what is at most, but an equity; and the cases which have been decided upon the statute show that the answer set up by an equitable replication *must, although brought before the Court on equitable grounds, not vary the right of demand alleged in the declaration: *Reis v. Scottish Equitable Assurance Society*, 2 H. & N. 19,† *Hunter v. Gibbons*, 1 H. & N. 459.† The facts set out in the replication here would give this plaintiff no right to sue.

Unthank, for the plaintiff.—The replications are good. Before The Common Law Procedure Act, 1854, a Court of law could look only at the nominal plaintiff; and what was an answer to his claim was an answer to the claim of the person for whose benefit the action was brought. That was decided in *Jones v. Yates*, 9 B. & C. 532 (E. C. L. R. vol. 17), *Gibson v. Winter*, 5 B. & Ad. 96 (E. C. L. R. vol. 27), and other cases. But even then a Court of law could exercise an equitable jurisdiction so far as to permit the assignee of a chose in action to sue in the name of the assignor, and to refuse to allow a plea of payment by the defendant, after notice to such assignor: *Legh v. Legh*, 1 B. &

P. 447; or of a release between them, where such release was, to the knowledge of the defendant, in fraud of a third party interested in the claim: *Phillips v. Clagett*, 11 M. & W. 84.† It appears from *Hammond v. Messenger*, 9 Sim. 327, that a Court of equity will allow the assignee of a debt to proceed in equity directly against the debtor where the assignor has done any act which would prevent the assignee from recovering at law in the assignor's name. That is an authority to show that, under such circumstances as, for instance, in the present case, a Court of law may, in the exercise of its equitable jurisdiction under *466] the statute, entertain an equitable claim of *the assignee. These replications, therefore, are clearly within the language of sect. 85, since they "avoid" the "plea on equitable grounds." They show that the assignee is really the plaintiff; the replications must be considered as his; and he is, practically, the party who sets up the fraud of the nominal plaintiff. In *Craib v. D'Aeth*, (a) a similar replication was pleaded.

Cleasby, in reply.—The replications, in effect, allege that the action was brought to support an equitable claim. The plaintiff, if that be so, should have sued in a Court of equity: the statute permits only such answers as support, on equitable grounds, a claim which, in its inception, is a legal one. The effect of the replication here is to set up a fresh plaintiff; that is not supporting the original legal claim, or answering, on equitable grounds, the plea which is the legal defence to that claim. *Craib v. D'Aeth* is in favour of the defendant; for it shows that a replication in this form, if it is to be considered as a replication at all, would have been just as good before The Common Law Procedure Act, 1854, as after it: and that therefore the replications here are not, as they profess to be, replications under the provisions of that statute.

Lord CAMPBELL, C. J.—I am of opinion that these equitable replications are good. The object of sect. 85 of The Common Law Procedure Act, 1854, was to allow an equitable replication to a plea which sets out facts that can be answered upon equitable grounds: such a plea, in fact, *467] as the Court would, before the *statute, have set aside in the exercise of what was called its equitable jurisdiction. Ever since *Winch v. Keeley*, 1 T. R. 619, Courts of law have allowed the assignee to sue in the name of the assignor, and, where any defence to the assignee's claim is founded on fraud by the nominal plaintiff, will set such defence aside. By the statute it was intended that the assignee should be allowed to put his own answer to such a defence upon the record, instead of bringing it forward, as he was obliged to do before, by affidavit. *Gibson v. Winter*, 5 B. & Ad. 96 (E. C. L. R. vol. 27), was no doubt a correct decision as the law then stood; we could then look only at the parties on the record, though we had, even then, an equitable jurisdiction, in the exercise of which we could set aside a plea upon grounds which would induce a Court of equity to do so. Here the replications are clearly within the statute: they deny that the nominal plaintiff had any right to release, inasmuch as, at that time, he had no interest, and is, in consequence, not the real plaintiff when the action was brought. The replications, therefore, "avoid" the "plea on equitable grounds."

COLERIDGE, J.—In deciding this question I think we may confine ourselves to the construction of sect. 85 of The Common Law Proce-

(a) Note (b) to *Bauerman v. Radenius*, 7 T. R. 670.

dure Act, 1854. To that section we ought to give as liberal a construction as we fairly can: and I do not think that we should be doing so if we held, as has been contended for the defendant, that an equitable replication under the statute must be in support of a demand which, in its inception, is a legal one. Before the statute, a cestui que trust could sue in the name of the trustee; and in certain cases, as here, the assignee in the name of the assignor. The declaration here [*468 is met by an inequitable plea. That plea we could, in the exercise of our equitable jurisdiction, have set aside before the statute; and the object of sect. 85 was to give to the plaintiff the power of answering such a plea himself, and making such answer a part of the record, when it avoids the plea upon the equitable grounds. The replications do so here; and the plaintiff is therefore entitled to judgment.

ERLE, J.—The replications here are clearly such as the Legislature intended, under sect. 85, to enable a plaintiff to put upon the record, instead of going into a Court of equity for relief, or availing himself, by a circuitous process, of the equitable jurisdiction of the Courts of law. Here the party really interested is suing in the name of the nominal plaintiff. The plea is a legal answer to the nominal plaintiff, but not an equitable answer to the real plaintiff, the assignee; the replications avoid that plea upon equitable grounds, and are clearly within the provisions of the statute.

(CROMPTON, J., was absent.)

Judgment for the plaintiff.

*HENRY JOHN SYRED, Appellant, v. MARY CARRUTHERS, Respondent. May 29. [*469

Under stat. 39 & 40 G. 3, c. 99, s. 24, the injury done to goods pawned, by an accidental fire on the premises of a pawnbroker, not affirmatively shown to have occurred through the default, neglect, or wilful misbehaviour of the pawnbroker, does not authorize a justice to give satisfaction to the pawner; there being no *prima facie* presumption that such fire is owing to the default, &c., of the owner of the premises.

When a case is stated under stat. 20 & 21 Vict. c. 43, sect. 2 is satisfied if the appellant within three days of his obtaining the case from the justice, seeks to find the respondent, but cannot do so, and within such three days, gives notice to the attorney who represented the respondent before the magistrate, and, after the expiration of the three days, gives notice to the respondent, who does not object. Under such circumstances, the Court will hear the appellant though the respondent does not appear.

THIS was a case stated, by a justice of the borough of Liverpool, for the opinion of this Court, under stat. 20 & 21 Vict. c. 43.

The appellant was summoned before the justice upon an information and complaint, laid by the respondent, which charged the appellant: "For that Henry John Syred, heretofore, to wit, on the 25th day of August then and now last past, at the borough aforesaid, being a person then and there using and exercising the trade and business of a pawnbroker, did lend and advance to one Mary Carruthers the sum of 1*l.* 5*s.* upon certain goods, to wit," &c., "the property of the said M. Carruthers, then and there pawned and pledged by the said M. Carruthers with the said H. J. Syred, as such pawnbroker as aforesaid; and that the said goods remained in pawn and so pledged as aforesaid with the said H. J. Syred, so being such pawnbroker as aforesaid, at the borough

aforesaid, until the said 22d day of February last: and that, within one year after the pawning and pledging of the said goods as aforesaid, and within twelve calendar months now last past, to wit, on the said 22d day of February last, at the borough aforesaid, the said M. Carruthers *470] applied to the said H. J. Syred, so *being such pawnbroker as aforesaid, and there offered to redeem the said goods so pawned and pledged as aforesaid: whereon it appeared that the said goods had become and had been rendered of less value than the same were at the time of pawning and pledging as aforesaid, by and through the default of the said H. J. Syred, his agents and servants." The case then proceeded as follows.

"The parties appeared before me on the summons: and I heard the case.

"Having heard it, I find that the said appellant was such pawnbroker as in the information is alleged; and that the said goods were pledged as aforesaid; and that such application and offer was duly made, and in due time, by the said M. Carruthers as aforesaid; and that the said goods had become and had been rendered of less value than the same were at the time of pawning and pledging as aforesaid: and I find that the said goods had so, as aforesaid, become and been rendered of less value by means of an accidental fire which took place upon, and consumed a part of, the premises of the appellant, in which he carried on his business of a pawnbroker, and kept his pawns and pledges. And there was no evidence before me to show that such fire was occasioned by the negligence or default of any person. I was of opinion, however, that, under the provisions of the Pawnbrokers Act, 39 & 40 G. 3, c. 99, s. 24, the pawnbroker is responsible for the state of his premises; and that, unless direct evidence was given of the cause of the fire, showing that he was not in fault, I ought to infer that it arose by his default. I also thought that the appellant, under the circumstances above shown, was responsible. And I made the order," &c.

*471] "The case concluded, by requesting "the opinion of the Court, whether, upon the facts stated in the case, I was bound to or ought to have made the said order: and I pray the opinion of the Court thereupon; and that the said Court will make such order and take such steps thereon as to the said Court shall seem meet: the only question upon which I wish to ask the opinion of the said Court is, Whether the evidence as to the mode in which the said goods were damaged bound me to make the said order, or justified me in so doing."

A copy of the order was subjoined, which recited the summons, and set out the complaint (which corresponded with the statement in the body of the case) and the appearance of the parties before the adjudicating justice. "And now, having heard the matter of the said complaint upon the oath of the said M. Carruthers, and having heard the said H. J. Syred in answer thereto, and, it appearing to me, the said last-named justice, that the said goods had become and had been rendered of less value than the same were at the time of the pawning and pledging thereof as aforesaid, by and through the default of the said H. J. Syred, his agents or servants: I, the said last-named justice, did thereupon allow, award, and adjudge the sum of 1*l.* 9*s.* as a reasonable satisfaction to be paid by the said H. J. Syred to the said M. Carruthers in respect of such damage of the said goods: and, the said sum of 1*l.* 9*s.*, so allowed,

awarded and adjudged as such satisfaction as aforesaid to the said M. Carruthers, the owner of the said goods as aforesaid, exceeding the principal and profit due to the said H. J. Syred as such pawnbroker aforesaid in respect of the said goods, to wit, exceeding the sum of 1*l.* 7*s.* 6*d.*, being the amount of such principal and profit *due in respect of the said goods, I do further order that the said H. J. Syred shall deliver the said goods so pledged as aforesaid to the said M. Carruthers, the owner thereof, without being paid anything for principal or profit in respect thereof, and shall also pay to the said M. Carruthers, the person entitled thereto, the sum of 1*s.* 6*d.*, being the amount of the excess in respect of the said goods, under the penalty of 10*l.* to be recovered and applied in manner and pursuant to the statute in that behalf made and provided.”

No one appeared for the respondent.

Brett, for the appellant, produced an affidavit that the appellant had, within three days after receiving the case from the justice, attempted to find the respondent, but had been unable to do so; and had, within the same three days, served a copy of the case on the attorney who had appeared before the magistrate in support of the complaint; and that he had also, after the expiration of the three days, served a copy on the respondent herself, who made no objection.

Lord CAMPBELL, C. J.—That is a sufficient compliance with sect. 2 of stat. 20 & 21 Vict. c. 43.

Brett.—The adjudication is under sect. 24 of stat. 39 & 40 G. 3, c. 99, which empowers the justice to award satisfaction where goods pawned “are become or have been rendered of less value than the same were at the time of pawning or pledging thereof, by or through the default, neglect, or wilful misbehaviour of the person or persons with whom the same were so pledged or pawned, his, her, or their executors, administrators, or assigns, *agents, or servants.” It clearly lies upon the party complaining to prove the default, neglect, or wilful misbehaviour; and that is not done by showing that an accidental fire has occurred on the premises of the pawnbroker. The pawnbroker is not responsible for the state of his premises unless he has been negligent; nor can there be, as the magistrate seems to have assumed, a *prima facie* presumption of negligence on his part. At common law, such a bailee is not an insurer; he is to take such care of the goods as he would reasonably take of his own: *Coggs v. Bernard*, 2 *Ld. Raym.* 909.(a) It is difficult to see how the pawnee could effect an insurance on the goods: at any rate his interest cannot be greater than the sum he has advanced.

Lord CAMPBELL, C. J.—It would be very unjust if he were liable without any default of his own: the statute guards against that by the very words used. Here we have, as far as the proof goes, an accidental fire without his default, neglect, or wilful misbehaviour.

COLERIDGE, ERLE, and CROMPTON, Js., concurred.

Judgment for appellant. (b)

(a) See note to *S. C.* in 1 *Smith's L. Ca.* 162 (4th ed.).

(b) See *Ex parte Cording*, 4 B. & Ad. 198 (*E. C. L. R.* vol. 24).

*474] *The QUEEN v. MAINWARING and Others. *May 29.*

Stat. 18 & 19 Vict. c. 108, s. 14, enacts that penalties imposed by the Act may be recovered within three months of the commission of the offence.

Within three months of the commission of an alleged offence, an information was laid before magistrates who, within the three months, refused to hear. After the expiration of the three months a mandamus issued commanding them to hear. They returned that, since the issuing of the writ, they had heard, when it appeared to them that the party charged was protected by the lapse of time, and they had therefore dismissed the information.

On demurrer to the mandamus:

Judgment for defendants, on the ground that they had obeyed the writ by deciding the case, whether their decision was right or wrong.

Semble, per Lord Campbell, C. J., and Crompton, J., that it was right: per Coleridge, J., and Erie, J., that it was wrong.

MANDAMUS directed to Rowland Mainwaring, Thomas Fletcher Twemlow, James Glover, and John Ridgway, Esquires, four justices of Staffordshire. The writ suggested that, on 20th January, 1857, "a certain information and complaint against Lancelot Llewellyn Haslope, as principal agent of John Edensor Heathcote, Esquire, the owner of the Woodshutts Colliery, in the parish of Audley, in the said county of Stafford, for an offence against the Act" (18 & 19 Vict. c. 108, "To amend the law for the inspection of coal-mines in Great Britain"), "came on to be heard before you, the said keepers of our peace and justices; and you, the said keepers of our peace and justices, were then and there required by and on behalf of Thomas Wynne, Esquire, an inspector of coal-mines for the district in which the said colliery is situate, to hear and determine the merits of the said information and complaint: but that you, the said keepers of our peace and justices, well knowing the premises, but not regarding your duty in that behalf, then and there wholly neglected and refused to hear and determine the said information and complaint, and dismissed the same without hearing and determining the merits thereof; nor have you, or any of you, at *475] any time since, heard and determined *the same: in contempt," &c. The writ then commanded: "That you do forthwith proceed to hear and determine the merits of the said information and complaint, or that you show us cause," &c. Tested, 14th May, 20 Victoria.

The justices, by return dated 9th March, 1858, returned "that the information and complaint in the within writ mentioned was not, after the issuing of the said writ, in any manner prosecuted or proceeded with by Thomas Wynne, or by any person on his behalf, or by any other person whatsoever, nor were we, or either of us, required by any person to hear and determine the same, until the notice hereinafter mentioned was received by us. That, on the 12th day of December, A.D. 1857, we were served with a notice that the further hearing of the said information and complaint, in pursuance of the within writ, would take place at ten o'clock in the forenoon, on Tuesday, the 22d day of December, A.D. 1857, at," &c., "in the said county of Stafford; and that we, Rowland Mainwaring and Thomas Fletcher Twemlow, two of such justices aforesaid, did accordingly, in compliance with such notice, and for the purpose of hearing and determining the said information and complaint, attend at the said last-mentioned time and place; and did then and there, in obedience to the within writ, proceed to, and did, hear and determine the said information and complaint. And we do hereby further humbly

certify that, upon such hearing as last aforesaid, it appeared before us, as the fact was, that the said information and complaint was a certain information and complaint of Thomas Wynne, of," &c., "that Lancelot Llewellyn Haslope, of," &c., "on the 17th day of December, 1856, at the parish of Audley, in the said *county, being the principal [*476 agent to John Edensor Heathcote, Esquire, at the Woodshutts Colliery, in the said parish of Audley, did neglect one of the general rules directed to be observed by the statute in such case made and provided, by neglecting to provide a proper indicator to a certain steam-engine at the said colliery used for lowering and raising persons: and that, upon such hearing as last aforesaid, it further appeared before us that the said alleged offence was committed on the 17th day of December, A. D. 1856; that the said information and complaint was made by the said Thomas Wynne on the 9th day of January, A. D. 1857; that the said original hearing of the said information and complaint and dismissal of the same, as in the within writ mentioned, was on the day and time and at the place therein also in that behalf mentioned. Whereupon, as it then manifestly appeared before us that more than three months had elapsed since the said alleged commission of the said alleged offence, we did then and there, upon the said hearing, adjudge and determine that the said L. L. Haslope was protected by the said lapse of time, and could not then be convicted of the said offence: And we did then and there adjudge and determine that the said information and complaint be dismissed: as we humbly submit we were for the cause aforesaid bound in law to do."

Demurrer. Joinder.

Welsby, for the Crown.—The defendants return that they have obeyed the writ: but, as they set forth how they profess to obey it, the question is raised, whether what they have done is an obedience to the writ. The information and the first refusal to hear were both *within the three months limited in stat. 18 & 19 Vict. c. 108, s. 14, which [*477 enacts that "all penalties imposed by this Act may be recovered in a summary manner before two justices of the peace," "having jurisdiction in the county or place where the offence is committed, within three months of the commission of the same, in the manner prescribed by the law in that behalf." The mandamus is tested on 14th May, more than three months after the commission of the offence: and it must be now presumed to have issued rightly: the justices, however, by their return, in effect contend that the mandamus itself was too late. But, as they show that the delay has arisen from their own default, they are not entitled to make this answer. [Lord CAMPBELL, C. J.—They could obey the writ only by following the law as it stood.] Then, secondly, "recovered" in sect. 14 refers, not to the time of the decision, but to the time when the proceedings were instituted; that is, in this case, to the exhibiting of the information. The course of summary proceedings is prescribed by stat. 11 & 12 Vict. c. 43. On the information, the justices issue the summons; then, if necessary, a warrant; then follows the hearing, &c. All following the information is the act of the justices: there is nothing prescribing when judgment is to be given. [Lord CAMPBELL, C. J.—May the justices proceed at any distance of time after the information? Must the summons not be within three months?] At any rate it was so here. [Lord CAMPBELL, C. J.—The justices might

adjourn.] They might so: but perhaps it can hardly be said that this was a case of adjournment. In *Rex v. Killminster*, 7 C. & P. 228 *478] (E. C. L. R. vol. 32), Coleridge, J., doubted whether *or not, under stat. 9 G. 4, c. 69 ("For the more effectual prevention of persons going armed by night for the destruction of game"), sect. 4, the preferring of a bill of indictment within twelve months after the commission of the offence satisfied the statute, so as to entitle the prosecutor, such bill having been ignored, to prefer a second bill after the twelve months had expired. There the statute simply directed that "the prosecution for every offence punishable upon indictment," "by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence." The language of stat. 8 & 9 W. 3, c. 26 ("For the better preventing the counterfeiting the current coin of this kingdom"), sect. 9, is "that no prosecution shall be made for any offence against this Act, unless such prosecution be commenced within three months after such offence committed." It was "held that the information and proceeding before the magistrate was the commencement of the prosecution within the meaning of the Act:" *Rex v. Willace*, 1 East's P. C. 186. *Rex v. Tolley*, 3 East 467, was a case under stat. 5 Ann. c. 14 ("For the better preservation of the game") and 9 Ann. c. 25 ("For making the Act of the fifth year of Her Majesty's reign, for the better preservation of the game, perpetual, and for making the same more effectual"). The defendant was convicted under sect. 1 of the latter Act, which provides that the forfeitures shall "be recovered by such means, and in such manner and form, and within such time, and to such use, as are prescribed by the said Act," 5 Ann. c. 14; sect. 2 of which provides "that such conviction be made within three months after such *479] offence committed:" and *it was held that, a hearing having taken place within the three months, which was, by consent of parties, adjourned to a day later than the three months, and the defendant having been on the day last mentioned convicted, the conviction was bad. That turned upon the word "conviction:" the question as to when the recovery of a penalty takes place is different.

Bovill, *contra*, was not called upon.

Lord CAMPBELL, C. J.—I deplore the circumstances which have prevented, in this instance, the enforcement of a beneficial Act. But the magistrates have *bonâ fide* exercised their judgment. They have obeyed the writ which directed them to hear, even if they have come to a wrong decision. But I think that they have not come to a wrong decision. The provision is, not that the proceedings shall be commenced within a given time, but that the penalties may be recovered within the time. The effect of that seems to me clearly to be that there must be judgment for the penalty within the three months. However much the magistrates might have misconducted themselves in first refusing to hear, they would be bound, when they did hear, to decide according to law.

COLERIDGE, J.—I am of the same opinion, on the ground that the magistrates have come to a decision, and, as we must take it, *bonâ fide*. I confess I have great doubts whether they have decided rightly. The question turns on the word "recovered." I should rather think that, *480] when the proceeding was commenced within the time, the statutory limitation was at an end. *But it is unnecessary for us to

pronounce a decision upon this point: the magistrates had the right of determining it.

ERLE, J.—It is clear to me that we must give judgment for the defendants, on the ground that they have heard the case: that is the safer ground. But I rather think that, if there is a hearing within three months, and necessity (as, for instance, in a case of ill health) arises for an adjournment, a decision after and in pursuance of such adjournment would be within the time.

CROMPTON, J.—The impression on my mind is that the recovery takes place when the judgment is pronounced, and that the effect of an adjournment might be that the time would elapse. But at all events it must be considered that here the case was sent back for the judgment of the magistrates; for, if it had been clear that the recovery could not take place within the time limited, we should not have been justified in sending the case back. We therefore sent it to them for their judgment: and I cannot say that they have judged wrongly: I rather think that they have judged rightly.

Judgment for defendants.

*The QUEEN v. RICHARD WOODS. *May 29.* [*481

W. appealed against a poor-rate by which he was rated in the parish of H. as occupier of land to an amount named and of a value named. The Sessions affirmed the rate, subject to a case which stated that W. did occupy that quantity of land in H.; and that it was of the value stated: but that he also occupied land in the adjacent parish of C.; and that it was not known which portion of the land was in H. and which in C., though the quantity occupied in each was known, and the value was rightly assessed whichever portion was in H. Held that the rate should stand, the Sessions not being bound to determine the particular portion which was within H.

ON appeal by Richard Woods, of the parish of Cottisford, Oxfordshire, against a rate for the relief of the poor of the parish of Hethe, in the same county, the Sessions confirmed the rate, subject to a case, in substance as follows.

The parishes of Hethe and Cottisford in the county of Oxford adjoin each other; and within them is situated a farm of five hundred and ninety-five acres, which, before and at the time of the making of the rate hereinafter mentioned, was and still is in the sole occupation of the appellant.

The said farm consists partly of one hundred and ninety-five acres, two roods, and thirty-two perches, which form part of the said parish of Hethe, and partly of three hundred and ninety-nine acres, one rood, and eight perches, being the residue of the said farm, which form part of the said parish of Cottisford. Neither the respondents, nor the appellant, nor the parishioners of Cottisford, know or can point out what part of the said farm forms the said part of the parish of Hethe, or what part forms the said part of the parish of Cottisford. "And we find that the same is unknown." The occupiers for the time being of the said farm have always been rated by and to, and paid rates to, the said parish of Hethe, poor-rates, church-rates, highway-rates, and land tax, in respect of such one hundred and ninety-five acres, two *roods, and thirty-two perches; and they have in like manner been rated by and to, [*482

and paid rates to, the said parish of Cottisford in respect of the said residue of the said farm.

On 16th October, 1856, the appellant was rated in and by the said parish of Hethe to a rate for the relief of the poor of the said parish of Hethe, in respect of one hundred and ninety-five acres, two roods, and thirty-two perches, parcel of the said farm.

The following is a copy of the said rate.

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Situation of Property.	Estimated extent.	Gross estimated rental.	Rateable value.	Rate at 1s. 3d. in the pound.
41	Woods Richard	Ramsay, Esq.	Land.	Hethe Tything.	A. R. P. 195 2 32	£ s. d. 68 1 3	£ s. d. 58 6 3	£ s. d. 3 12 10½

The amount so assessed in respect of the said 195 acres, 2 roods, and 32 perches is, as regards the appellant, a reasonable amount, whichever part of the said farm be assumed to belong to Hethe; there not being any 195 acres, 2 roods, and 32 perches of the said farm of less rateable value than the sum so assessed. "Subject to the question submitted to the Court, we find that the said rate was in all respects duly made; and, subject to such question, we confirm the same. And the question which is submitted to the Court is:

"Whether a valid poor-rate can be made in respect of the said 195 acres, 2 roods, and 32 perches, parcel of the said farm, under the above *483] circumstances, without it *being stated or known in respect of which part of the said farm such rate is so made. If the Court shall be of opinion that a valid poor's-rate can be made in respect of part of a farm under such circumstances, then the rate is to be confirmed. If the Court shall be of a contrary opinion, then the rate is to be quashed."

Bovill and Cripps, in support of the order of Sessions.—The appellant is a rateable occupier within stat. 43 Eliz. c. 2; and he is rateable to the amount assessed, as appears by the express finding in the case. The fact is found that he occupies land, within the parish, to the extent and value named. What the particular property is which he does so occupy is immaterial: the lands of the two parishes are intermixed; but there is no question as to the amount: and such cases cannot be uncommon. The appellant can show no grievance: and, in fact, it appears that he has for a long time made the payments without objection. The objection, if it were good, would equally apply to the payment of rates in Cottisford. In *Regina v. Eastern Counties Railway Company*, 5 E. & B. 974 (E. C. L. R. vol. 85), the description, in the rate, of the property rated was "land, &c." The Court held that this did not authorize justices to refuse a warrant of distress; leaving, however, the question as to the validity of the rate to be raised on appeal. The Sessions have confirmed the rate; which therefore must stand unless it be affirmatively shown to be unlawful.

Pashley and R. Sawyer, contra.—The appellant of course is willing *484] to pay the rate for the full value of the *land which he occupies: and it is indifferent to him to which parish he pays it: what he

is apprehensive of is that he may be made to pay for the same land twice over. The parish of Cottisford may not agree as to the several amounts in the two parishes. If two different parties occupied the land, it would be impracticable to apportion the rates in the two parishes. It would not be enough to show that a man occupied half a dozen houses in some parish or other, and then to rate him in a particular parish. The appellant could not be liable to a recovery in ejectment for land which could not be ascertained, except by quantity; there could be no *habere facias possessionem*. To what parish would casual poor be attributed who were found on the doubtful land? In *Regina v. Eastern Counties Railway Company*, 5 E. & B. 974 (E. C. L. R. vol. 85), the question was merely on the form of the rate.

LORD CAMPBELL, C. J.—In my opinion, what the Sessions have done is perfectly correct. They find that the appellant occupied land to the extent and value described in the rate: it is not necessary that they should find the particular portion.

COLERIDGE, J.—I am of the same opinion: and I agree that the Sessions are not bound to determine the boundaries.

ERLE, J.—The appellant is to pay rate in respect of the quantity of land which he occupies in the parish: and that quantity is found.

*CROMPTON, J.—All the requisites of a rate are made out. [*485 It is sufficient to show that the party rated occupies land in the parish of a certain value: and that is done here. We cannot call on the Sessions to say this particular close belongs to one parish, and this other close to another. Order of Sessions affirmed.

OCKENDEN *v.* HENLY. *May 31.*

Plaintiff put up for sale by auction real property, upon conditions of sale which stipulated that the purchaser of each lot should "forthwith pay into the hands of the auctioneer a deposit of 20 per cent. on the purchase-money, and sign the agreement" to pay the remainder, and "that, if the purchaser of either lot shall fail to comply with these conditions, the deposit-money shall be actually forfeited to the vendor, who shall be at full liberty to resell such lot either by public auction or private contract; and any deficiency that may arise upon such resale, together with all expenses attending the same, shall immediately after such second sale be made good by such defaulter; and, on non-payment thereof, such amount shall be recoverable by the vendor as and for liquidated damages." Defendant became a purchaser at the auction, but did not pay the deposit or complete the purchase. Plaintiff resold at a price below that for which defendant had purchased; and the deficiency, with the expenses of sale, exceeded the amount of the deposit.

Held: that plaintiff was entitled to recover from defendant the amount of the deficiency and expenses only, and not, in addition to this, the amount of the deposit.

Per Curiam. Had the deposit been paid, and the bargain completed, the deposit would have gone in part payment of the purchase-money: and, in the case of the non-completion of the bargain, if the deficiency and expenses had together been less than the deposit, the purchaser would have been entitled to the whole deposit, but nothing more.

THE declaration charged that plaintiff, to wit, on 15th May, 1857, by Jabez Streeter, his auctioneer and agent in that behalf, caused certain property to be put up and exposed to sale by public auction in lots, upon and subject to the following, among other conditions of sale: that is to say: That the highest bidder should be the purchaser; That the purchaser should immediately pay down into the hands of the auctioneer, that is to say the said J. Streeter, 20l. per cent. in part of his purchase-

money, and enter into an agreement for payment of the residue of the said purchase-money on or before the 15th day of June then next ensuing; and *that, in case the purchaser should fail to comply with *486] the said conditions, the deposit-money should be forfeited, and the vendor be at liberty to resell the said tenements with the appurtenances; and the deficiency, if any, together with all charges, should be made good by the defaulter; as by the said conditions of sale, &c. That, on the said exposure to sale, defendant was the highest bidder for, and then became and was in due manner declared to be the purchaser of, lot 1 of the said premises, at and for a large sum of money, to wit, 120*l*. And thereupon afterwards, to wit, on the day and year first aforesaid, in consideration thereof, and that plaintiff, at the request of defendant, had then promised defendant to perform and fulfil all things in the said conditions of sale contained, on the part of the vendor to be performed and fulfilled, he, the said defendant, &c. (mutual promises). And, although plaintiff hath always been ready and willing to perform, and hath duly performed, all conditions precedent, and other things on his part to be done and performed as such vendor as aforesaid, yet defendant, disregarding, &c., did not nor would pay down into the hands of the auctioneer 20*l*. per cent. in part payment of the said purchase-money, pursuant to the said conditions of sale and his said promise, but wholly neglected and refused so to do. And, for assigning a further breach, plaintiff further saith that, although defendant did sign an agreement for the payment of the remainder of the said purchase-money on or before the 15th day of June then next ensuing, yet defendant, further disregarding, &c., did not nor would, on or before the said 15th day of June then next ensuing, or at any other time, pay or cause to be paid to plaintiff the remainder of the said purchase-money, *487] or any part thereof, *but then wholly neglected and refused so to do, and wholly refused then, or at any other time, to complete the said purchase according to the said conditions and his said promise. And, for assigning a further breach, plaintiff further saith that, default having been made in payment of the said deposit, and also in payment of the remainder of the purchase-money as aforesaid, the plaintiff afterwards, and after the said 15th day of June, to wit, on the 30th day of June, A. D. 1857, according to and by virtue of the said conditions of sale, again exposed the said premises, so purchased by defendant as aforesaid, to sale by public auction, under and subject to certain terms and conditions of sale similar to the terms and conditions of sale under which defendant became the purchaser as aforesaid: and the same were then, at such last-mentioned exposure to sale as aforesaid, resold for a much less price or sum than the said price or sum for which the same had been sold to defendant as aforesaid, to wit, for the sum of 105*l*. only. Whereby there then was a deficiency between(a) the said price for which the same were so sold on such resale to a large amount, to wit, to the amount of 15*l*.: and the charges attending such resale then amounted to a certain other sum of money, to wit, the sum of 9*l*. 5*s*. Yet defendant, further disregarding the said conditions of sale and his said promise, hath not as yet paid the said sums of 15*l*. and 9*l*. 5*s*. or either of them, or any part thereof. And plaintiff hath duly performed all conditions precedent on his part to maintain this action for the non-payment by

the defendant of the said 20 per cent. in part of his said purchase-money pursuant to *the said conditions, and also for the non-payment [488 by the defendant of the deficiency and expenses on and attending such resale as aforesaid.

Pleas: 1. Non assumpsit.

2 & 3. As to the second breach: pleas not now material.

Issues on all the pleas.

On the trial, before Erle, J., at the Middlesex Sittings in last Hilary Term, it appeared that the defendant became purchaser, as stated in the declaration, on 15th May, 1857, for 120*l*. The conditions of sale which became material on the following argument were the following.

1. "That the highest bidder shall be the purchaser," &c.

3. "That the purchaser of each lot shall forthwith pay into the hands of the auctioneer a deposit of 20 per cent. upon the purchase-money, and sign the agreement at the end of these conditions to pay the remainder at the office of Mr. French of Littlehampton, the solicitor of the vendor, on or before the 15th June next: upon payment whereof each purchaser shall be entitled to the possession of the lot purchased, or to the rents and profits of such as may be let. But, if, from any cause whatever, the whole purchase-money shall not be then paid, the remainder thereof shall bear interest at 5 per cent. per annum from that time until payment; without prejudice, however, to the right of the vendor requiring the completion of the purchase or of reselling the lot under the 7th condition if he shall so think fit."

7. "That, if the purchaser of either lot shall fail to comply with these conditions, the deposit-money shall be actually forfeited to the vendor, who shall be at full *liberty to resell such lot either by public [489 auction or private contract; and any deficiency that may arise upon such resale, together with all expenses attending the same, shall immediately after such second sale be made good by such defaulter; and, on non-payment thereof, such amount shall be recoverable by the vendor as and for liquidated damages, without the necessity of previously tendering an assignment or other assurance to such defaulter. But any increase of price that may be produced at such second sale shall belong to the vendor."

The defendant and the auctioneer signed the following.

"Memorandum. It is hereby declared that Mr. John Henly has this day purchased by public auction lot 1, mentioned in the particulars hereto, subject to the foregoing conditions of sale, for the sum of 120*l*.; and, further, that the said sale and purchase shall be completed agreeably to the said conditions. As witness the hands of the said Jabez Streeter and John Henly, this 15th day of May, 1857. JOHN HENLY, JABEZ STREETER."

The defendant did not pay the deposit, or complete the purchase: and the plaintiff, after notice to the defendant, resold the property by public auction for 105*l*. The expenses of the second sale amounted to 9*l*. 5*s*. The jury found for the defendant on the issues upon the second and third pleas, but for the plaintiff on the first issue; damages 48*l*. 5*s*., being the aggregate of 24*l*. (20 per cent. on 120*l*.), 15*l*. (difference between 120*l*. and 105*l*.), and 9*l*. 5*s*. (expenses of second sale).

Griffiths, in last Hilary Term, obtained a rule calling upon the plaintiff to show cause why a new trial should not be had, "for misdirection,

on the ground that the plaintiff was not entitled to recover as well the *490] amount *which ought to have been paid as deposit as the amount of his damages; or why the verdict should not be reduced by the sum of 24*l.*, on the ground that the plaintiff is not entitled to recover that sum as deposit, as well as all the damages."

In this Term, (a)

Hannen showed cause.—The question is, whether the deposit is to be reckoned as only forming part of the damages resulting from the non-performance of the contract, or whether the plaintiff is entitled to the deposit, as an absolute forfeiture, and to the damages besides. There is little authority on the point; and the question must be determined by the language of the particular agreement. It appears that the parties contemplated that the difference on the resale should be cumulative. Suppose the purchaser, immediately upon the sale, had failed to comply with the conditions, by the seventh condition the deposit-money would have thereupon been "actually forfeited;" and, after that, the vendor would have been at full liberty to resell, and recover any deficiency and the expenses of sale. The one was manifestly not intended to exclude the other. In *Icely v. Grew*, 6 N. & M. 467, the conditions of sale stipulated that, if the purchaser should fail to comply with any of the conditions, "the deposit shall be forfeited, as liquidated damages, to be retained by the vendors, who shall be at liberty to rescind the contract, and resell the lot;" "and the deficiency, if any, by the second sale, together with all charges attending the same, shall be made good *491] *by the defaulter." It was held that the mere stipulation as to the deposit did not qualify the rest of the contract; and that it need not be set out in the declaration, the plaintiff being entitled to general damages upon the resale, and the clause as to the deposit applying only to the breach of any particular condition. That, as far as it goes, is in the plaintiff's favour, though it is not quite clear what was there done. The reporters have added a note (a) pointing out that it did not appear whether the jury, in assessing the damages, gave credit for the deposit. The defendant, in the present case, must contend that the seventh condition contemplates only an indemnity: but that is inconsistent with its language. If there had been no resale, there would simply have been a forfeiture of the deposit: then the additional right of resale, with its consequences, is also reserved. Suppose the action had been merely for the deficiency on the resale, and the expense: no doubt the whole of the deficiency and expenses could have been recovered: but how could such a recovery affect the right to the deposit?

Griffiths, contra.—There is, as has been said, no direct authority: but the point must have been considered in *Icely v. Grew*, 6 N. & M. 467. At all events, that case is not against the defendant. The Court will not adopt a construction favouring a penalty. If the vendor chooses not to resell, he is to resort to the deposit as his remedy: if he does resell, he relies upon the amount of damage resulting from that. A question something like this arose in *Palmer v. Temple*, 9 A. & E. 508 *492] (E. C. L. R. vol. 36): but there the deposit was held *not to be forfeited by the failure to perform the bargain, because there

(a) May 22d. Before Lord Campbell, C. J., Coleridge, Erie, and Crompton, Ja.

(b) Note (a) to 6 N. & M. 469.

was a distinct clause stipulating for the forfeiture of another sum, in that event. It appears, however, from the concluding part of the judgment there, that, if there were here no words of forfeiture, the defendant might recover back the deposit. In *Savile v. Savile*, 1 P. Wms. 745, a vendee was allowed to refuse to complete the purchase upon the mere forfeiture of the deposit. Here the resale opens the whole question of damages, which, if there had been no resale, would have been liquidated to the amount of the deposit: by the words of the seventh condition, on the resale the damages are liquidated to the amount of the deficiency and the expenses. Nothing is said as to the "forfeiture" of the deposit being cumulative upon the loss on the resale; which might easily have been stipulated for. (a) *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

There having been an actual forfeiture of the deposit by the express words of the seventh condition, the deposit, if paid, could not in any event have been recovered back by the purchaser; and the seller would have been entitled to any additional benefit on a resale. But, the seller having obtained a right to the forfeited deposit, and making a further demand of damages sustained on the resale, it becomes necessary to consider what was the nature of the deposit. Now it is well *settled that, by our law, following the rule of the civil law, a [*493 pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase-money, and not as a mere pledge: *Sugd. V. & P. ch. i., sect. III., art. 18* (13th ed.). Therefore in this case, had the deposit been paid, the balance only of the purchase-money would have remained payable. What then, according to the seventh condition, is the deficiency arising upon the resale which the seller is entitled to recover? We think the difference between the balance of the purchase-money on the first sale and the amount of the purchase-money obtained on the second sale: or, in other words, the deposit, although forfeited so far as to prevent the purchaser from ever recovering it back, as, without a forfeiture, he might have done (*Palmer v. Temple*, 9 A. & E. 508 (E. C. L. R. vol. 36)), still is to be brought by the seller into account if he seeks to recover as for a deficiency on the resale.

The rule to reduce the damages to 2*l.* 5*s.* will therefore be absolute.

Lord St. Leonards takes the same view with ourselves.

Rule absolute for reducing the damages.

(a) See *Sugden's V. & P. ch. i. sect. II. art. 75, 76*, (13th ed.).

*HART v. BUSH. May 31.

[*494

Defendant, at Lancaster, verbally ordered goods of the value of more than 10*l.* to be sent to him at Lancaster from London by plaintiff; and he directed that the goods should be sent by sea from G.'s wharf, which was the only wharf in London whence goods were shipped for Lancaster; and from which wharf goods had previously been sent by plaintiff to defendant. Plaintiff sent the goods to G.'s wharf; whence the wharfinger sent them by a ship, selected by himself, for Liverpool; but the cargo was lost by the ship being wrecked on her voyage from London to Liverpool. An invoice was sent, at the time of the shipment, by plaintiff to defendant; which defendant never received.

Held: that the defendant did not accept and actually receive the goods, within the meaning of sect. 17 of the Statute of Frauds (29 G. 2, c. 3).

DECLARATION for goods bargained and sold, sold and delivered,

money paid, and on accounts stated. Plea: Never indebted. Issue thereon.

On the trial, before Erle, J., at the London Sittings after last Hilary Term, it appeared that the plaintiff was a wine merchant in London, and the defendant a wine merchant at Lancaster; and that the action was brought for the recovery of 37l. 10s., the price of some brandy purchased of the plaintiff by the defendant. The order was given at Lancaster, in July, 1853, to Symons, the plaintiff's traveller, by the defendant, verbally; the defendant directing that the brandy should be sent to him by sea from Griffin's Wharf, London, which appeared to be the only wharf in London whence goods were shipped for Lancaster; and from which wharf goods had previously been sent by the plaintiff to the defendant. The brandy was sent to this wharf on 30th September, 1853; and the wharfinger shipped it on board *The Emerald Isle*, a vessel bound for Liverpool. This ship appeared to have been selected by the wharfinger himself. The following invoice and letter were sent, on 1st October, to the defendant.

*"London, 30th September, 1853.

*495] "Mr. William Bush, Lancaster.

"Bought of Lemon Hart & Son

"One Hhd Superior Jersey Brandy, 60 Galls, at 12/6 per Gall.
£37 : 10 : 0.

"To Griffin's Wharf: per Eliza."

"Sir, We have forwarded the above agreeably with your instructions to Mr. G. Symonds, when he last had the pleasure of seeing you. Soliciting your future favours, We are, yours truly, pro LEMON HART & SON, JAMES CUTLER."

The defendant, however, denied having received this invoice, and, on being asked for payment, said that he knew nought about it, and had never received the brandy; a denial which he repeated on subsequent occasions. It appeared that the vessel and cargo were both lost on the voyage from London to Liverpool. The defendant's counsel contended that there was no receipt of the brandy, so as to satisfy the 17th section of the Statute of Frauds. A verdict was found for the plaintiff, leave being reserved to the defendant to move as after mentioned.

M. Chambers, in last Easter Term, obtained a rule calling on the plaintiff to show cause why a verdict should not be entered for the defendant, or why a nonsuit should not be entered: "on the ground that there was no sufficient evidence of an acceptance and receipt of the goods within the 17th section of the Statute of Frauds, so as to bind the defendant."

Lush and *C. W. Wood* now showed cause.—There was enough in this case to satisfy sect. 17 of the Statute of Frauds, 29 C. 2, *496] c. 3. In *Meredith v. Meigh*, 2 E. & B. 364 (E. C. L. R. vol. 75), the defendant ordered goods of plaintiff, and directed that they should be sent by sea to a carrier, whom the defendant named, and who transmitted goods by inland navigation to the defendant's residence. The plaintiff selected a ship, and sent the goods consigned to the carrier; but they were lost at sea before reaching the carrier. The plaintiff had sent the bill of lading, in which the carrier was named as consignee, to the carrier. The defendant, though he knew of all this, did nothing,

verbally or otherwise. It was held that there was not evidence for a jury of an acceptance and receipt within sect. 17 of the Statute of Frauds. But here the goods actually reached the wharfinger named by the defendant: that is a receipt and actual acceptance of them by the defendant's agent. It is not material that the defendant had no opportunity of examining the goods: that does not affect the question as to the Statute of Frauds, which, as it is now held, may be satisfied by facts still leaving it open to the vendee to object that the goods are not such as to correspond with sample. In *Hanson v. Armitage*, 5 B. & Ald. 557 (E. C. L. R. vol. 7), it was held not sufficient, for the purpose of the statute, to deliver the goods to a wharfinger by whom goods had usually been forwarded from the vendor to the vendee: it did not there appear that the wharfinger was designated by the vendee on the particular occasion. [Lord CAMPBELL, C. J.—That case must now be considered the leading case on this point.] It has been overruled on one point, namely, as to the continuance of the right of objecting to the goods being enough to prevent the delivery from being sufficient [*497 under the statute:(a) but otherwise it must be considered as law: it is, however, distinguishable from the present case on the ground pointed out. In an earlier case, *Hart v. Sattley*, 3 Campb. 528, Chamber, J., held that a delivery to a carrier usually employed between the parties was sufficient. [Lord CAMPBELL, C. J.—In *Meredith v. Meigh* we treated *Hart v. Sattley* as overruled.] It was, however, cited in *Morton v. Tibbett*, 15 Q. B. 428 (E. C. L. R. vol. 69), and apparently treated by the Court as an authority. [Lord CAMPBELL, C. J.—In *Morton v. Tibbett* the vendee took a sample, and directed the destination of the goods: that was clearly evidence of acceptance.] The present case has the fact, which was not in *Hart v. Sattley*, that the particular wharfinger is named by the vendee for the particular goods. And the invoice is sent, at the time when the goods are sent, and is never repudiated. In *Bushel v. Wheeler*,(b) it was held to be evidence for a jury, of an acceptance within the statute, that the vendee had ordered the goods to be sent by a particular sloop, and afterwards saw them in the warehouse of the owner of the sloop, and, though he then told the warehouse-man that he would not take to the goods, did not communicate to the vendor his repudiation for five months. The judgment of Coleridge, J., in that case is strongly in favour of the present plaintiff.

M. Chambers and *T. Jones* (Northern Circuit), contra, were not called upon.

*Lord CAMPBELL, C. J.—The Legislature continues to maintain sect. 17 of the Statute of Frauds; and I do not think that [*498 the enactment is satisfied by the facts of this case. All that can be said is that the purchaser here named the wharf, and that there was a delivery at that wharf. I think that, where there is a verbal contract and an order to deliver to a particular carrier, a delivery to that carrier does satisfy the statute. But in the present case there was a delivery at the wharf only: the wharfinger had only to see that the goods were properly put on the wharf and hoisted on board ship. *Hart v. Sattley*, 3 Campb. 528, is no longer law, as we declared in *Meredith v. Meigh*, 2 E. & B. 364 (E. C. L. R. vol. 75).

(a) See *Morton v. Tibbett*, 15 Q. B. 428 (E. C. L. R. vol. 69).

(b) Note to *Morton v. Tibbett*, 15 Q. B. 442.

COLERIDGE, J.—I am of the same opinion. It is impossible to say that the mere naming of the wharf makes the wharfinger the agent to accept. Mr. *Lush* seems to assume that the wharfinger was placed in the situation of the vendee. But the facts do not bear that out.

ERLE, J.—I agree that the sending to the wharf and the putting on the wharf does not satisfy the words "accept" "and actually receive," however absurd the words of the statute may be.

(CROMPTON, J., had left the Court.)

Rule absolute.

***499] *ELIZABETH PENROSE v. JOHN MARTYR. June 1.**

P. directed a bill to a company of limited liability by the name of The S. W. Steam Packet company, its full name being the S. W. Steam Packet Company, Limited. J. M., who was secretary to the company, wrote across it "Accepted, payable at Messrs. B. & Co., J. M., secretary to the said company." The bill was not honoured.

Held, on demurrer to a plea, that J. M. was personally liable to P. under The Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 31.

FIRST count: That defendant, at the time of the signing by him of the bill of exchange hereafter mentioned, was an officer, to wit, the secretary of The Saltash Watermen's Steam Packet Company, Limited; and plaintiff, by her bill of exchange, now overdue, directed to the said company, to wit, by the name of The Saltash Watermen's Steam Packet Company, Saltash, required the said company to pay to plaintiff 39*l.* 4*s.* 3*d.*, two months after date; and defendant signed the said bill on behalf of the said company as the acceptor thereof. Averment: That the name of the said company, The Saltash Watermen's Steam Packet Company, Limited, is not mentioned in the said bill of exchange, or in the said acceptance thereof by defendant, in manner required by The Joint Stock Companies Act, 1856; and that plaintiff was and is the holder of the said bill of exchange; and the same has not been paid by the said company. Wherefore plaintiff sues defendant, according to the form and effect of the said statute.

First plea to the first count: That the bill was by plaintiff herself, and no other person, addressed and directed in the form and words in the said first count mentioned; and that the said supposed acceptance of the same by defendant on behalf of the company was in and by the words following, and in and by no other or different words or form, that is to say: "Accepted, payable at Messrs. Barclay & Co., Bankers, *500] London. *John Martyr, Secretary to the said Company." Issue thereon.

Plea 2: That defendant did not sign the bill on behalf of the company as acceptor thereof.

Second replication to plea 1: That, at the time of the drawing and acceptance of the bill, plaintiff did not know, and defendant did know, that the said company was a company with limited liability under the said statute. Issue thereon.

The defendant also demurred to the first plea. Joinder in demurrer.

The fourth count was on another bill of exchange, on which there were similar pleadings. There were also other counts not necessary to notice.

On the trial, before Lord Campbell, C. J., at the Guildhall Sittings

after last Easter Term, the bills were produced. The first was in the following form:—

“Plyme, 7 month 9 (July), 1857.

“£39: 4: 8.

“Two months after date pay to my order, in London, 39*l.* 4*s.* 8*d.*, value received. “ELIZABETH PENROSE.”

“To The Saltash Watermen’s Steam Packet Company, Saltash.”

[Across the face of this was written “Accepted, payable at Messrs. Barclay & Co., Bankers, London. John Martyr, Sec^y to the s^d C^y.”]

The other bill was similar, except in date and amount.

The handwriting across the bills was that of the defendant.

It was admitted that the company was registered as a company with limited liability, and that the defendant was the secretary of that company, having power to accept bills on its behalf. The plaintiff proved that she drew the bills for coals supplied to the company, and that she was not aware that the company was limited till after [*501 the bills were accepted.

The verdict was directed for the plaintiff, with leave to move to enter a verdict for the defendant.

M. Smith, in the ensuing Term, obtained a rule to show cause why the verdict should not be entered for the defendant, on the ground that the pleas were proved, and that the defendant was not liable; or why the judgment on the first and corresponding count should not be arrested, or entered for the defendant, notwithstanding the verdict on the second replication.

The Court directed that the demurrer should be argued at the same time as the rule.

Raymond now showed cause, and argued in support of the demurrer.—The Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 31, enacts that, if any officer of a limited company, or any person on its behalf, “signs or authorizes to be signed on behalf of such company any bill of exchange, promissory note, endorsement, check, order for money or goods, or issues, or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid” (that is, in characters easily legible; sect. 30), “he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, check, or order for money or goods, for the amount thereof, unless the same is duly paid by the company.” The bill, it appears on the record, was directed to the company, and is accepted by the defendant, who signs it as secretary to the company. If the word “limited” *had not been omitted this would have been an acceptance binding the company and not the defendant. *Lindus v. Melrose*, 2 H. & N. 293.† (He was then stopped by the Court.) [*502

M. Smith and *Karslake*, contra.—The enactment is a penal one, and must be construed strictly. Here there was no draft properly directed to the company. [Lord CAMPBELL, C. J.—The enactment is partly penal, and also remedial, intended to protect the creditors by securing to them notice that they deal with a company which is “limited.” Is not a bill like this such a bill as was contemplated by the Legislature?] The officer is to be liable only in case the company do not pay; there

must be such an acceptance as to bind the company, or the Act does not apply. Now here is no acceptance at all; the bill is addressed to the company; it could not be accepted by any one but the drawee: *Mare v. Charles*, 5 E. & B. 978 (E. C. L. R. vol. 85). [CROMPTON, J.—That was the converse of the present case: the draft there was addressed to the defendant personally, and he accepted, in terms that left it ambiguous whether he accepted for himself or for a company. The Court thought it a strong ground for construing the acceptance as binding himself, that otherwise it would have been inoperative. But that argument makes the other way here.]

LORD CAMPBELL, C. J.—I think the case too clear for serious argument. The draft is directed to the company; and it is accepted by their officer; and, though he does not say in terms that he accepts it for them, he says, "Accepted" "John Martyr, Secretary to the said *503] company;" which is saying he signed it on their behalf. So he has signed a bill on their behalf without their name on it.

COLERIDGE, J.—The object of the Legislature obviously was to force notice of the limited liability on those dealing with the company; and the clause is in one sense penal, in another remedial. I cannot doubt that this is within the enactment.

(ERLE, J., not having heard the whole argument, took no part in the judgment.)

CROMPTON, J.—I think that the intention of the enactment plainly was to prevent persons from being deceived into the belief that they had a security with the unlimited liability of common law, when they had but the security of a company limited; and that, if they were so deceived, they should have the personal security of the officer. Therefore I think we must see that the acceptance is one which, if the name had been right, would have bound the company. Now it was said in *Mare v. Charles*, 5 E. & B. 978 (E. C. L. R. vol. 85), and I think it has been approved of in the Exchequer that it is a strong argument for construing an acceptance as intended to bind the drawee, that it would be inoperative if not so intended; and, applying that principle, this is an acceptance for the company. And, if this purports to be an acceptance on behalf of the company, I cannot doubt that the case is within the enactment.

Judgment on the demurrer for plaintiff.
Rule discharged.

*504] *JOSEPH STONE, Appellant, v. SAMUEL DEAN,
Respondent. June 1.

Stat. 13 & 14 Vict. c. 61, s. 14, giving an appeal from the county court, makes it a condition precedent that security for costs should be given within ten days after the determination complained of.

THIS was an appeal from the county court of Derbyshire.

On the appeal being called on, *H. Bullar* moved, on behalf of the respondent, that the appeal should be disallowed. He moved on affidavits by which it appeared that the decision of the county court was

given on the 10th March. On the 20th March notice of appeal was given. On the 13th April a draft case was delivered by the appellant to the respondent. On the 14th April, being the court day, the respondent's attorney objected before the judge that the case ought not to be settled, as no security had been given. The judge overruled the objection, and adjourned the settling of the case to a future day, directing that security should be given in the mean time; which was done.

H. Bullar.—Stat. 13 and 14 Vict. c. 61, s. 14, gives an appeal to the party dissatisfied with the determination or direction of the county court, "provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party, or his attorney, and also give security, to be approved by the clerk of the court, for the costs of the appeal." The natural grammatical sense of those words is to make the giving of both the notice of appeal and the security within ten days a condition precedent: and that condition has not been fulfilled.

**Hayes*, Serjt., showed cause in the first instance.—The security here has been given within the time the judge of the county [*505 court thought reasonable, though after the ten days; and the question is whether, by the statute, the limit of ten days applies to the second branch of the proviso as well as to the first, or whether the period for giving security is to be a reasonable time after the giving of the notice of appeal. The scheme of the Act is to give the party ten days for making up his mind whether he shall appeal. After he has determined to appeal he has to get his sureties, have them approved, and have the securities perfected; all of which must take time. If he has to do all this within the ten days, his time for consideration whether he will appeal or not is much cut down; and the words, provided the party shall within ten days give notice of appeal, "*and also give*" security, are quite capable of meaning, and also, scilicet within a reasonable time thereafter, give security. The words "within ten days" do not necessarily override both branches.

H. Bullar was not called upon to support his rule.

Lord CAMPBELL, C. J.—I am of opinion that we must strike this appeal out. The question depends on the construction of the proviso in stat. 13 & 14 Vict. c. 61, s. 14. In the natural *primâ facie* sense of the words, the words "within ten days after such determination or direction" override all that follows. If they do not, the Act prescribes no period within which the security must be given. Now I assent to what my brother *Hayes* says, that the words are not so certain but that we might construe them as he does, if the *primâ facie* meaning was such as to lead to great inconvenience. *But I see great inconvenience if we [*506 construe them in any other than the *primâ facie* meaning. It is no part of the functions of the judge of the county court to see that the security is given in due time: and unless the Act has prescribed a period there might be vexatious delay.

COLERIDGE, J.—The statute gives a new power of appeal under certain circumstances: but if that power of appeal were given without some limitation as to time it would be very inconvenient. There is therefore nothing *primâ facie* against the limitation as to time extending to all the conditions preliminary to the appeal. Now any one reading the words of the proviso would say that, unless there were something to show the

contrary, the words "within ten days" apply to all that follows in the sentence. My brother *Hayes* says that the effect of that is to force the party, before the end of the ten days, to make up his mind whether he will appeal. That is so; and whatever limit is put to the time for giving the security the effect would be the same. Construing the words in their ordinary sense, ten days is the time prescribed; and if we construed them as prescribing no time there would be much inconvenience.

ERLE, J.—I think it might have been very judicious to have enacted that the party should have more time to give his security, and to have given the judge of the county court power to enlarge that time. But the words of the enactment, as it stands, plainly do not do so.

CROMPTON, J.—It seems to me that the words are plain, and that if *507] we put a forced construction on them *we should introduce a mischievous vagueness as to time. Delay by an appeal may be very vexatious: and I think the enactment very judiciously gives a fixed time within which the security must be completed. If that time is too short the Legislature may enlarge it; but I think it would be dangerous if they were to render the period uncertain. It is enough, however, to say that the *prima facie* construction of the words is plain, and that there is no mischief in so construing them. Appeal struck out.

LORING v. WARBURTON. *June 1.*

An action lies for detaining goods taken, under a distress for rent, after a sufficient tender made before impounding.

SECOND count: that plaintiff occupied certain premises as tenant at a certain rent: and defendant, falsely and maliciously pretending that 40*l.* was due and in arrear for the rent, wrongfully distrained certain goods of plaintiff of much greater value than the said sum of 40*l.* then upon the premises; whereas a part only, to wit, 30*l.*, was due and in arrear for rent: and, although afterwards, and before defendant impounded the said distress, plaintiff tendered to defendant, in discharge of the said rent so due and in arrear, and the costs and charges of the distress, a sufficient sum to cover both, to wit, 40*l.*, yet defendant would not accept it and restore the goods, but wrongfully detained them until plaintiff was obliged to pay and did pay 40*l.* for the rent and 3*l.* 7*s.* 8*d.* for the costs, being a much larger sum for costs and charges than plaintiff would otherwise have been obliged to pay had defendant received the sum tendered as he ought.

Demurrer. Joinder.

*508] *Third count: that defendant had taken and distrained certain goods of plaintiff as a distress for rent, to wit, the sum of 40*l.*, claimed by defendant to be due and in arrear in respect of premises in the occupation of plaintiff, and on which the goods were distrained: and, before defendant had impounded the distress, plaintiff tendered to defendant, in discharge of the said arrear of rent and the costs of the distress, 45*l.*, being a sufficient sum to cover both; but defendant refused it, and wrongfully impounded the distress, and afterwards converted the goods to his own use.

Demurrer. Joinder.

Prentice, for the defendant.—The point raised is, that the remedy of the tenant is by replevin, and that no action lies for detaining the distress: *Glynn v. Thomas*, 11 Exch. 870.† [ERLE, J.—There was in that case a grievous wrong; and the law gives no remedy. I always wondered why. But in the present case the tender is before impounding. Lord CAMPBELL, C. J.—Why on principle should not the detention, under such circumstances, be actionable? It is admitted to be wrong in law. It is *damnum cum injuriâ*.] It seems to have been held not actionable in *Glynn v. Thomas*, 11 Exch. 870.† [CROMPTON, J.—I should be sorry to go beyond that case. It goes quite far enough. COLERIDGE, J.—There is clearly a distinction; for here the tender is before impounding.]

Griffiths, contra, was not called upon to argue.

Per CURIAM.(a)

Judgment for plaintiff.

(a) Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

*The QUEEN v. The Corporation of the City of LONDON. [*509
June 2.

A Judge has no power, either by statute or at common law, to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor.

WILDE, in last Easter Term, obtained a rule calling upon the prosecutors to show cause why the following order, which had been removed by certiorari, should not be quashed.

The part of the order material to the present case was as follows.

"Central Criminal Court, to wit." "The Queen, on the prosecution of The South Eastern Railway Company, against William Pierce, James Burgess, and William George Tester.

"Whereas the said William Pierce, James Burgess, and William George Tester have been at this present session convicted of feloniously stealing, taking, and carrying away five hundred pounds in weight of gold, four hundred ounces of other gold, one hundred bars of gold," &c., "the property of the said South Eastern Railway Company, the said James Burgess and William George Tester being at the time of the commission of the felony aforesaid servants to the said South Eastern Railway Company: And whereas it has been made to appear to this Court that" "certain Turkish bonds, of the nominal value of 2300*l.*, now in the hands of Sir Richard Mayne, one of the Commissioners of Police of the Metropolis, by virtue of a certain order of this Court made in this present session, were found in the possession or power *of [*510 the said William Pierce at the time of his apprehension for the felony aforesaid: And it has also been proved to the satisfaction of this Court that one-sixth part of the said Turkish bonds was bought by or for the said William Pierce out of the proceeds of the said felony, and that the said sixth part was in fact so bought with money produced by sale of part of the said goods, chattels, and property so stolen as aforesaid, and that the remaining five-sixths of the said Turkish bonds were at the time of the apprehension of the said William Pierce for the felony

aforesaid held by the said William Pierce as trustee for one Fanny Bolan Kay and her child: Now this Court doth order" "that the said Sir Richard Mayne do forthwith deliver the said Turkish bonds so in his hands as aforesaid to" "John Charles Rees," the solicitor to the said company, "and that the said J. C. Rees, and the said South Eastern Railway Company do upon the receipt thereof retain one-sixth part thereof to and for the use of the said South Eastern Railway Company, and do forthwith settle the remaining five-sixth parts thereof upon trust for the said Fanny Bolan Kay and her child, in such manner and form as the said Fanny Bolan Kay may be advised."

The affidavits in support of the application for the certiorari stated that the Corporation of London claimed to be entitled to the said bonds, or to part thereof, by virtue of several charters, set out in one of the affidavits, by which the Crown granted to the Corporation the goods and chattels of all felons convicted of felonies committed within the city or its liberties: that the Corporation, after the conviction stated in the order, attended before Martin, B., and Willes, J., in support of such *511] claim, as against other parties so attending and *claiming to be entitled to the said bonds: and that, pending the discussion, the learned Judges ordered that the said bonds should be handed over to Sir Richard Mayne; and, on 5th January, 1858, made the order now in question.

Petersdorff now showed cause.—The order is good. It is not an order made under stats. 21 H. 8, c. 11, (a) or 7 & 8 G. 4, c. 29, s. 57. Those Acts merely empower the Court to restore the particular property stolen to the owner. But, where the property in the possession of the felon, is under the immediate control of the Court, the Court has power, at common law, to order the disposal of it. [ERLE, J.—If the property is that of the felon, I do not see how the Judge can order the disposal of it contrary to the grant of the Crown: if it is the property of some one else, the Judge has only the power, by statute, to order it to be restored to that person.] When the property is partly the felon's, partly that of some one else, and is mixed up together, as it was here, the Judge has power, at common law, to order the apportionment of it. The Court clearly had power to make that part of the order directing the restitution of one-sixth to the prosecutors. But, further, as the whole matter was argued, upon affidavit, before the two learned Judges who made the order, it may be considered as having been referred to them, by consent, to make such order as they should think fit. [Lord CAMPBELL, C. J.—No: if the order is brought up before us, we are bound to quash it, or any part of it, if it is illegal, and affects the rights of any subject.] At all events, this order should not be quashed generally. *512] [WILDE, *contrà*.—The Corporation do not contend that *it should: they apply only to have so much of it quashed as relates to the five-sixths of the Turkish bonds.]

Wilde and *Sleigh*, *contrà*, were not called upon.

Lord CAMPBELL, C. J.—I am of opinion that so much of the order as relates to the disposal of five-sixths of the Turkish bonds must be quashed. I do not think that the Judges have the power, either by statute or at common law, to order such a disposal of the property in question. The rule, therefore, as to that portion of the order, must be absolute.

Rule absolute.

LEE v. STEVENSON. *June 2.*

Lease of land by plaintiff to defendant, reserving to plaintiff power to enter upon the land, and to dig and make a covered sewer and watercourse through it, in order to convey away the drainage from plaintiff's premises.

Plaintiff made a sewer accordingly: defendant made a drain from his own premises, and carried it into the sewer.

Held, that plaintiff was entitled to the exclusive use of the sewer; and that he could recover in an action against defendant for so interfering with such exclusive use.

TRESPASS. The first count stated that defendant broke and entered certain land of the plaintiff, in the city of Lincoln, called the sewer, and took and carried away a pipe of the plaintiff, part of the same; and also caused to pass into the said sewer earth, dust, &c., and impure and filthy water, and thereby choked and impeded the same. The second count stated that the plaintiff was entitled to the exclusive use and enjoyment of a covered sewer, situate in the city of Lincoln, for the conveying of the waste water from certain messuages of the plaintiff, in the city aforesaid, into the river Witham; yet the defendant made an opening in and *into the said sewer, and caused earth, dust, [*513 straw, and rubbish, and impure and filthy water, to pass into the same, and otherwise interfered with and hindered and prevented the plaintiff's right to such exclusive use and enjoyment as aforesaid, and has continued the said grievances until the present time. The third count charged defendant with wrongfully converting and depriving plaintiff of the use of certain pipes.

Pleas. 1, to first count. That the said land was not the plaintiff's. 2, to second count. That plaintiff was not entitled to the exclusive use and enjoyment of the covered sewer in that count mentioned. 3, to third count. Payment into Court. 4, to first and second counts, Not Guilty. Issues on first, second, and fourth pleas.

On the trial, before Lord Campbell, C. J., at the last assizes for Lincoln, it appeared that, by a lease dated 11th September, 1837, plaintiff demised to defendant a piece of land in the city of Lincoln for twenty-one years, "save and except and always reserved out of this present demise unto the said J. W. Lee" (plaintiff), his heirs and assigns, upon his and their giving one month's previous notice to the said John Stevenson" (defendant), his executors or administrators, of his or their intention to act upon the same, the power and authority to enter upon the said parcel of land hereby demised, with workmen and others, and to dig and make a covered sewer or watercourse through the said parcel of land from the east end thereof to the west end thereof, in order to convey the waste water from the premises of him the said J. W. Lee at the east end thereof into the river Witham, in case he or they should think proper to do so, on making reasonable compensation to the said J. Stevenson, his executors or administrators, for any *damage or injury which may be occasioned thereby, either to [*514 the surface of the ground, or to the buildings, floors, walls, or foundations through or under which the same may be made." The lease also contained a covenant by the plaintiff to convey the freehold of the said land to the defendant, if he should desire to purchase it at any time during the said term, for 600*l.*, "but subject to such privilege to and for the said J. W. Lee, his heirs and assigns, to make or construct a covered sewer or watercourse as hereinbefore mentioned."

The plaintiff, during the continuance of the term, constructed a covered drain, through and under the land, for the purpose of conveying the drainage of his premises into the river. In 1857, the old sewer, having been found ineffective, was taken up; and plaintiff substituted, with the consent of the defendant, in the same spot, a new sewer, laid down with tiles. The defendant joined to and carried into this sewer a drain of his own, leading from his premises, being the trespass alleged. The defendant's counsel having admitted that the question was, whether the plaintiff was entitled to the exclusive use of the sewer, or only to an easement in it, the learned Judge directed a verdict to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit.

Knowles, in last Easter Term, obtained a rule nisi to enter the verdict on the two first and last issues for the defendant, on the ground that the plaintiff took an easement only, and not an exclusive right.

Macaulay and *Field* now showed cause.—First, the clause may be considered to operate as an exception out of the land demised, as the line of ground along which the sewer passes has been ascertained by the *515] *election of the plaintiff to exercise his right of entry. Secondly, as regards the second count, the reservation is clearly of an exclusive right. The plaintiff, by the terms of the lease, has no power to make a sewer larger than is necessary for the purpose of carrying off his own drainage: it is to be made at his expense; and he is to make compensation to the defendant. A mere right of easement in the plaintiff would be utterly inconsistent with these provisions. Further, the defendant contends that no cause of action accrues until some actual damage has been done to the sewer. But that is not so: the plaintiff has a cause of action as soon as the sewer is interfered with. [*CROMPTON, J.*—That would be a damage.] In *Rex v. Bell*, 7 T. R. 598, a lessee of wayleaves was held to be rateable to the poor as exclusive occupier of the ground over which they lay. [They were then stopped by the Court.]

Knowles, Mellor, and Boden, contra.—As to the argument that the clause in the deed operates as an exception of the land to be used for making the sewer, it is clear that the plaintiff has no such estate in that portion itself as would justify him in bringing this action. His position is analogous to that of a waterworks company, whose pipes pass through the land, and who have a right of access to them, but who are not, on that account, either owners or occupiers of the land: *Chelsea Waterworks Company v. Bowley*, 17 Q. B. 358 (E. C. L. R. vol. 79). The plaintiff has merely a license to do a particular act upon the land, such license conferring on him no estate in that portion of the land which is the subject of such act: *Doe dem. Hawley v. Wood*, 2 B. & Ald. 724; *516] **Chetham v. Williamson*, 4 East 469. [Lord CAMPBELL, C. J.—How do you meet the second count?] The plaintiff has not, as is there alleged, an *exclusive* use of the sewer: he has merely an easement in respect of it, for the purpose, and only for the purpose, of carrying off the drainage from his premises; and he has a right of action only for an obstruction of that particular easement. [Lord CAMPBELL, C. J.—The lease gives him a license to make a sewer, not merely to use one. Can you say that such license is merely an easement?] In *Bryan v. Whistler*, 8 B. & C. 288 (E. C. L. R. vol. 15), it was held that a license to make and have the exclusive use of a vault in a church com-

ferred an easement only, and not an interest in the land. [Lord CAMPBELL, C. J.—To whom do the materials of the sewer belong?] Probably to the plaintiff: but he has still nothing but an easement in the sewer, as regards any interference with it; until his particular enjoyment of the sewer is interfered with, he has no right of action. [Lord CAMPBELL, C. J.—The defendant does interfere, when he does that which prevents the plaintiff from having such particular enjoyment.] The defendant has caused no damage, at all events. [Lord CAMPBELL, C. J.—That is not material. COLERIDGE, J.—Besides, the defendant could not have done what he has, without causing damage by breaking into the sewer.] He has paid money into Court for that. [CROMPTON, J.—No; only for the value of the materials, not for the damage.] The lease does not stipulate that the plaintiff's right to the use of the sewer is to be exclusive. [COLERIDGE, J.—Suppose he had made an iron sewer, and that the defendant could not attach a drain to it, would the plaintiff have exceeded the right reserved to him by the lease?] At all events, the defendant has not *interfered with the plaintiff's use of it as made. [*517 Lord CAMPBELL, C. J.—It can make no difference whether the sewer is of iron or tile.] *Senhouse v. Christian*, 1 T. R. 560, illustrates the principle upon which licenses of this kind are to be limited and restricted. The plaintiff's right is analogous to that of a right of way for horses and carriages over the land of another: that would not prevent the owner of the land from sending his own horses and carriages across it, as long as he did not interfere with the particular easement granted.

Lord CAMPBELL, C. J.—I am of opinion that judgment should be for the plaintiff. Looking, as we must, to the nature and intention of the grant, it is clear that it gives the grantee an easement consisting of the exclusive right to use the sewer. If it had given him merely the right to carry his drainage along the surface of the land to the river, the defendant might have used the same channel without incurring any liability. But the lease grants to the plaintiff power to "dig and make a covered sewer or watercourse" [his Lordship read the whole of the clause in question], in order to convey the waste water from the *premises* of the plaintiff (limiting, therefore, the area of the drain), making compensation to the defendant: that is, substantially, a right to place a pipe through the defendant's land, of such dimensions, and no more, as will be sufficient to carry off the *plaintiff's* waste water through the land into the river. I am of opinion that such a grant is a grant to the plaintiff of the exclusive use of the pipe, not merely of the right to have his waste water run through it. Whether it be of metal or tile, the defendant cannot have made use of it without breaking into it; and for any interference at all with it *he is liable to an action, the plaintiff having the right to the exclusive possession of it for a particular purpose [*518 of his own.

COLERIDGE, J.—I am of the same opinion. The plaintiff complains of the infringement by the defendant of the right granted to him by the defendant. What did the defendant grant? We must decide that by looking at the words of the grant and the intention to be gathered from them. The grant is clearly not of a mere right of flow for the plaintiff's waste water over the defendant's land: if it were, the defendant would certainly not be liable to an action for using the same channel for his own drainage. But the right reserved to the plaintiff is a right to make a

covered sewer, adequate, and no more than adequate, for the conveyance of his own waste water. The clear inference from the terms of the grant is that the sewer was to be constructed with a view to this particular purpose only, and that the defendant gave up all right to interfere with it in any way. We have a right to assume that it has been so constructed: and therefore any interference with it by the defendant is actionable.

ERLE, J.—I am clearly of opinion that the reservation in the lease gives the plaintiff an exclusive right in the sewer. The stipulation is a very important and a very useful one, and is quite borne out by the language of the grant.

CROMPTON, J.—I also am of opinion that the right granted to the plaintiff is to have a sewer of his own passing through the demised land for the purpose of conveying away his own waste water only. The defendant *519] is liable to an action if he does anything inconsistent with the plaintiff's right, so limited. Whether, if he does so, he causes actual damage or not, is immaterial: the case comes within the operation of the general rule, that no one can derogate from his own grant. *Cheatham v. Williamson*, 4 East 469, and *Doe dem. Hawley v. Wood*, 2 B. & Ald. 724, are distinguishable. In the former case, the owner of the soil, as well as the grantee, had a right to take the coal; and after the owner had severed it, it was his property still; but, if, in obtaining it, he had interfered with the grantee's license to enter and dig, the grantee would have had a right of action. The cases of right of way are not analogous: there the use by the owner of the soil would not be inconsistent with the right reserved to the grantee; here it would. Rule discharged.

The QUEEN v. The Overseers of the Township of NORTH BIERLEY. *June 3.*

Under sects. 2 & 3 of stat. 5 & 6 Vict. c. 109, where justices issue a precept to overseers requiring them to return a list of a competent number of men in their parish to serve as constables, and the overseers accordingly summon a vestry within the fourteen days after receiving the precept, prescribed in sect. 3, the vestry has no discretion, but must make out the list.

Therefore, where such vestry, having met in obedience to the precept, had adjourned for a twelvemonth, and made no return, this Court, on motion made after the expiration of the fourteen days, issued a mandamus commanding the overseers to summon a vestry for the purpose of making out and returning a list.

Although the affidavits in support of the rule disclosed no ground for considering the appointment of the parochial constables to be necessary, and although, in opposition to the rule, it was deposed that the inhabitants considered the appointment of parochial constables to be superfluous and uselessly expensive, a paid police having been appointed under stat. 19 & 20 Vict. c. 69.

And although it was also deposed that the parochial constables of the preceding year were ready to serve on.

T. F. ELLIS, in last Term, obtained a rule, calling on the overseers *520] of the poor of the township of North Bierley, the inhabitants of the said township, and the justices of the West Riding of York acting for the division in which the said township is situate, to show cause why a mandamus should not issue commanding the overseers to give notice of a vestry meeting of the inhabitants of the township,

“to meet and assemble themselves in vestry, and then and there to make out a list in writing of a proper number of persons residing within the said township qualified and liable to serve as constables of the said township; and commanding the said justices to hold a special session within the said division, and give due notice thereof, and then and there to choose from the said list the names of such number of persons as they may deem necessary to act as constable within the said township for the remainder of the year then and next following, and until other constables shall be chosen and sworn to act in their stead as constables for such township; and commanding the said overseers, inhabitants, and justices to do everything necessary to be done by them or any of them respectively in order to the due and effectual appointment of a constable for the said township.”

From the affidavits on which the rule was obtained, it appeared that the township of North Bierley is situate in the East Division of Morley in the West Riding of Yorkshire; and that the clerk to the justices usually acting at Bradford, in and for that division, being directed so to do by a precept under the hands and seals of two of such justices, at the commencement of this year, made out a list and description of the petty and special sessions to be holden by them during the year, with the day of the month on which such session was to be holden; and that the clerk delivered a copy to each of the justices long before the 1st of April, the *day fixed by the justices for the appointment of [521 parish constables, according to stat. 5 & 6 Vict. c. 109. Early in February, the clerk delivered to a constable of Bradford a precept and duplicate thereof, dated 3d February, 1858, under the hands of two justices usually acting for the division, directed to the overseers of the township, commanding them, in pursuance of the Act, to make out and return, before 24th March then next, a list in writing of seventy, being a competent number, of able-bodied men, resident and qualified and liable to serve as constables within the township, with the Christian name, &c., and to return and send the list to the office of the clerk; and giving notice that a special session would be holden by the justices usually acting for the division, at the Court House in Bradford, on 1st April, at 11 A. M., for the appointment of parochial constables; at which time and place the overseers were required to verify the list upon oath. On 4th February the constable delivered the duplicate of this precept to one of the overseers of the township. In pursuance of this precept the overseers legally called a meeting of the rate-payers to be holden on 12th February, for the purpose of making out a list of persons qualified to serve as constables for the ensuing year. The meeting was held accordingly; when a motion was carried, “That this meeting be adjourned for twelve months;” and the meeting was adjourned accordingly. And no list was made out at that or any subsequent meeting; and none had been returned, as required: but the overseer appeared before the justices on 1st April, and stated the facts.

In answer, affidavit was made by a deponent who had been a resident inhabitant in the township for forty-five years, and was a freeholder and rate-payer, and a *guardian of the poor of the Union in which [522 the township was situate. He deposed that he attended the meeting of 12th February. “That at such meeting the utility of making out any such list was discussed. That it was considered wholly

unnecessary to do so, by reason of the justices of the said riding having organized, under the powers of the Rural Police Act, and at an immense cost to the rate-payers, a constabulary or police force in and for the West Riding of Yorkshire; which force was, at the time the said meeting was held, and is now, in full operation in the said township of North Bierley; and which force was, as the said meeting thought, and which the inhabitants at large think, abundantly sufficient for the requirements of the said township at all times. That it was therefore the unanimous opinion of the rate-payers present at such meeting that the proposed appointments of parochial constables were wholly unnecessary and useless, and that it had been an unintentional oversight of the Legislature in not repealing the Parochial Constables Act, on the Rural Police Act being brought into operation. That the inhabitants of the said township have always considered, and yet consider, the former Act virtually repealed. That the inhabitants, so assembled in vestry as aforesaid, conceived that by the required annual appointment of parochial constables under the former statute an useless waste of money was entailed upon the said township, in magistrates' clerks' fees and other expenses attendant upon such appointments. That the inhabitants, so assembled at the said meeting, also conceived that they had all the ancient rights and privileges of a vestry. And the said meeting acted purely under the impression that they had a discretionary power of making out such

*523] *list, or not, as a majority of the said meeting might deem expedient. And that, acting under that impression, and for the reasons above stated and no other, the said meeting was adjourned for twelve months. That I had not, and, as I verily believe, no person at the said meeting had, any intention to set the law at defiance: nor had I, or, as I verily believe, any person at the said meeting, any knowledge that an adjournment of the said meeting for twelve months was illegal or improper. That the establishment of the said Rural Police force under the recent statute has entailed upon the said township of North Bierley an annual cost of considerably above 250*l.*: whereas, prior thereto, the constabulary force was, up to the establishment of such Rural Police force, always formed and gratuitously maintained by the parishioners to the entire satisfaction of the rate-payers at large. That the said Rural Police force is also in full and effective operation in the townships of Thornton and Clayton, both of which are contiguous or near to the said township of North Bierley; and the same is amply sufficient for all the requirements of those townships. That it is also, as I verily believe, in operation throughout the said Riding, and equally effective. That I verily believe that it is the unanimous opinion of the rate-payers of the said township of North Bierley that, so long as the present Rural Police force exists, the annual appointment of parochial constables is utterly useless, and only tends to entail upon the several townships, in and for which such appointments are made, the costs of magistrates' clerks' and other fees attendant upon such appointments. That I never knew any symptoms of disaffection or insubordination amongst any class of the inhabitants of the said township. That

*524] *all classes are most peaceably disposed, and ever ready to obey the law."

Other affidavits to the same effect were made by other inhabitants. One of the overseers deposed that the disobedience to the precept on the

part of the meeting arose from misapprehension of the law, they considering it discretionary with them to return the list or adjourn; and that the adjournment was resolved upon solely with the view of saving the township the appointment of fresh constables for the ensuing year. That, until recently, it had been the prevailing opinion of the inhabitants "that the Parochial Constables Act was repealed by the recent statute enabling the justices to establish a Rural Police force, and that the latter statute had been passed in entire substitution of the former." One of the present constables of the township, who had held office for twenty years, deposed "that the other parochial constables have not, nor have or hath any of them, so far as I know and believe, had any services whatsoever to perform, except to post certain notices in pursuance of the precept issued annually for the appointment of assessors, and collectors of taxes, and surveyors of the highways, and to serve the summons on the parochial constables. That the whole of the duties of constables in and for the said township are performed by the officers appointed under the recent statute, except as hereinbefore alluded to." "That I am ready and willing, and always have been ready and willing, as have the other parochial constables been ready and willing, as I verily believe, to perform the office till others are appointed, and will cheerfully perform all the duties which may be required of them. That there is not the most remote probability of any being required."

**Pashley* now showed cause.—Stat. 2 & 3 Vict. c. 93, s. 1, [*525 makes it lawful for the justices in Quarter Sessions, if it appear that the ordinary officers for preserving the peace are not sufficient, to report to a principal Secretary of State how many paid constables are needed, and the proper rates of payment; and the Secretary may then make rules, &c. The chief constable is to appoint the petty constables, subject to the approval of the justices: sect. 6. Sect. 8 gives these paid constables throughout the county the common law or statutable powers of petty constables in their constablewicks. This shows that no public duty remains to be necessarily executed by the common law constables; and therefore the mandamus to appoint such common law constables will not go. This statute is further carried out by stat. 3 & 4 Vict. c. 88: and sect. 16 of that statute provides for the appointment of local constables for any particular parish, township, or place; and sect. 27 provides for the formation of police districts, with the proper number of constables for each. Then stat. 19 & 20 Vict. c. 69, incorporating, by sect. 31, the two statutes before mentioned, makes it compulsory on the justices to establish a sufficient police force, it having before been left to their discretion. These statutes appear to provide fully for the performance of the duties of constables by the paid police force. It is true that sect. 25 of stat. 2 & 3 Vict. c. 93 provides "that nothing herein contained shall prevent or invalidate the appointment of parochial constables:" but a mandamus will not go to compel such appointment, where no necessity is shown affirmatively by the affidavits in support of the rule, and where the affidavits in answer expressly negative such necessity: if such necessity were shown, it might be *right to act on the pro- [*526 viso in sect. 25. The old constables are willing to serve on. This application is made under stat. 5 & 6 Vict. c. 109, "for the appointment and payment of parish constables." [CROMPTON, J.—I cannot understand how that Act is affected by the earlier statutes, 2 & 3

Vict. c. 93, and 3 & 4 Vict. c. 88.] It is not unreasonable to consider stat. 5 & 6 Vict. c. 109 as virtually repealed by stat. 19 & 20 Vict. c. 69. Even if it be doubtful whether there should be an appointment, a mandamus would not go. [ERLE, J.—Stat. 5 & 6 Vict. c. 109, s. 2, gives to the justices the discretion as to issuing the precept, which, by sect. 3, is to name the number. You say the discretion is with the vestry, whether they will obey the precept.] At any rate, the mandamus asked for in the rule cannot go: sect. 3 requires that the meeting be holden within fourteen days after the receipt of the precept: but that time has expired.

T. F. Ellis, contra.—As to the last point: the justices have done their duty in issuing their precept, and the overseers in calling the vestry meeting: the vestry has failed to perform its duty, and will be compelled to do so: for this purpose the overseers must summon them anew. *Regina v. Mayor of Rochester*, 7 E. & B. 910 (E. C. L. R. vol. 90), is in point as to that. The argument on the other side assumes that the vestry has the right to disobey the precept: but sect. 3 is peremptory. The justices, under sect. 2, have determined the number of parochial constables wanted to aid the police: the number of the police must have *527] been fixed with reference to the aid which would be *given by the parochial constables. The affidavits in answer appear to rest on the ground: first, that the justices were, in the opinion of the vestry, wrong; as to which no power of deciding is lodged in the vestry: secondly, that the Legislature has acted erroneously; a matter equally without the cognisance of the vestry. If necessary, it can be shown that duties are by law incumbent on parochial constables which the paid policemen cannot perform, besides those noticed in the affidavits. (He was then stopped by the Court.)

Lord CAMPBELL, C. J.—I assent, with great reluctance, to the opinion that this rule must be made absolute. One of the greatest improvements of our time has been the appointment of a paid police instead of men of the class of Dogberry and Verges. Such appointment is made compulsory by stat. 19 & 20 Vict. c. 69; so that there does not seem to be kept up any necessity of appointing the old parochial constables, which may have merely the effect of annoying individuals by disturbing them in the exercise of their ordinary callings. Still, under stat. 5 & 6 Vict. c. 109, a power has been reserved of appointing the parochial constables where the justices deem it useful. It does look here, on the affidavits, as if no inconvenience would result from omitting this, and as if all duties might be performed by the paid police. But the discretion is vested in the justices: they have issued their precept, which has not been obeyed. At first I was under the impression that the motion had been for a mandamus to direct the issuing of a precept, thus commencing a proceeding entirely new: but I see that it is to enforce the original *528] precept, which is still *in force. *Regina v. Mayor of Rochester* shows that we may compel obedience, nunc pro tunc.

COLERIDGE, J., concurred.

ERLE, J.—I concur, on the ground assigned, that the discretion is in the justices, and that the vestry has chosen to dissent. But I must say that, this power being vested in the justices, there has been nothing shown which raises any doubt in my mind that it has been most properly exercised; and the presumption is that they have done their duty.

CROMPTON, J.—It must, I think, be allowed that the justices have the initiative. Thus far, we cannot see that the discretion is otherwise than in them; and, if so, there has been an usurpation by the vestry. There ought therefore to be a mandamus to enforce the precept. I agree that the magistrates should issue their precept on good grounds only: here there has been no opportunity of replying to the objections made on the part of the vestry; and some imputations have been thrown out to which we can attach no weight. I agree, however, that it is in general advisable to have all the constabulary powers lodged in one set of functionaries: but we are bound to presume that the justices have acted according to the best of their judgment; and they think it right to have parochial constables. Rule absolute.

*HIGGS v. GOODWIN. June 3.

[*529]

A patent was entitled "Treating chemically the collected contents of sewers and drains in cities, towns, and villages, so that the same may be applicable to agricultural and other useful purposes." The description of the process stated that, for the purpose of precipitating the matter, the patentee preferred to employ hydrate of lime; and he claimed the precipitation of animal and vegetable matter from sewage water by the means before described. It stated that the invention consisted in the use and application of a chemical agent for the purpose of precipitating the solid animal and vegetable matter contained in sewage water; and that what was claimed was the precipitation of animal and vegetable matter from sewage water by means of the chemical agent before described.

In an action for an infringement of this patent, it appeared that defendant had applied the process and the hydrate of lime for the purpose of deodorizing sewage water: in the course of which some precipitate of animal and vegetable matter was produced, which, however, defendant did not use as an article of value, but *bonâ fide* rejected as an article accidentally produced.

Held, that this was no evidence for a jury of the infringement of the patent.

ACTION against the defendant, as clerk to the Local Board of Health for the town of Hitchin, in Hertfordshire, for infringement of the plaintiff's patent.

The declaration alleged that the plaintiff was the true and first inventor of a certain new manufacture, that is to say, "treating chemically the collected contents of sewers and drains in cities, towns, and villages, so that the same may be applicable to agricultural and other useful purposes:" that letters patent had been granted to him to make, use, and exercise and vend the said inventions, and certain other things invented by him, by and under the title of "The means of collecting the contents of sewers and drains in cities, towns, and villages, and for treating chemically the same, and for applying such contents, when so treated, to agricultural and other useful purposes:" that a specification of the said invention was duly enrolled by the plaintiff: that a disclaimer was also entered by him, whereby he disclaimed certain parts of the said title, and altered the residue thereof to "Treating chemically the collected contents of sewers and drains in cities, towns, and villages, so that the same may be applicable to agricultural *and other useful purposes;" and also altered certain parts respectively of [*530 the said specification. Breach: That the said Local Board of Health, at divers times during the term of the said patent, and before the com-

mencement of this suit, infringed, and still continues to infringe, the said patent right of the plaintiff.

The particulars of breaches, delivered with the declaration, stated that the "above-mentioned Local Board of Health, at divers times between the 27th May, 1857, and the commencement of this suit, used hydrate of lime for the purpose of precipitating the solid animal and vegetable matters contained in sewage water, according to and in imitation of the plaintiff's invention."

Pleas: 1. Not guilty. 2. That the plaintiff was not the true and first inventor, &c. 3. That the undisclaimed part of the said alleged invention was not new at the time of granting the said letters patent. 4. That the said undisclaimed part was not, nor is, a matter for which letters patent could by law be granted. 5. That the nature of the said undisclaimed part of the said invention, and the manner in which the same was and is to be performed, were not, nor are they, particularly described or ascertained according to the true intent and meaning of the said letters patent. 6. That the said undisclaimed part of the said invention was not, at the time of granting the said letters patent, of any public or general use. Issues on all the pleas.

At the trial, before Erle, J., at the last Spring Assizes for Hertfordshire, it appeared that the plaintiff's specification described the invention as consisting, "firstly, in the construction of tanks or reservoirs, in which the contents of sewers and drains in cities, towns, and villages *531] are to be collected, and the solid animal and vegetable *matters therein contained solidified and dried;" "secondly, in the construction of buildings over such tanks and reservoirs, in which the vapours and gases evolved from the collected mass of sewage below may be collected, retained, condensed, and combined with chemical agents;" "thirdly, in the construction and arrangement of machinery and apparatus to be used in distributing and depositing chemical agents over the mass of sewage;" and, "fourthly, in the use and application of chemical agents for the purpose of precipitating the solid animal and vegetable matter contained in sewage water, and also for the purpose of absorbing and combining with the gases evolved from such sewage water, and the animal and vegetable matters contained therein or precipitated therefrom." The specification described the construction of the tanks, buildings, and apparatus, and proceeded to describe the fourth part of the invention thus: "I will now describe the fourth part of my invention, the object of which is to precipitate all the solid animal and vegetable matter contained in the sewage water from time to time run into one of my tanks before described, and to cause the vapours and gases arising therefrom to be condensed, absorbed, or combined with some other substances in the chambers above. For the purpose of precipitating the animal and vegetable matter contained in the sewage water, I prefer to employ hydrate of lime, commonly termed slacked lime, which, so far as I know, is the cheapest and most efficient chemical agent for effecting this purpose. But the carbonate of lime, and some others of the alkaline earths, either in their simple or compound states, as well as some other substances, may perhaps be employed for a similar *532] purpose; but, so far as I know, the employment *of any other substance than hydrate of lime will not be so efficient or convenient for effecting the purposes aforesaid." The specification described

the mode of condensing the vapors and gases, and ended by claiming, "fourthly," "the precipitation of animal and vegetable matter from sewage water, and also the condensation, combination, and crystallization of vapours and gases arising from sewage matter in tanks or reservoirs, by the means and in the manner hereinbefore described."

The plaintiff, on the day on which the specification was enrolled, also entered a disclaimer; in which, after reciting that, since the enrolment of his specification, he had found that some parts of his said invention therein described were not of much value, and that he was therefore desirous of disclaiming the same, he thereby altered the title of his said invention to "Treating chemically the collected contents of sewers and drains in cities, towns, and villages, so that the same may be applicable to agricultural and other useful purposes." He then disclaimed the whole of the first, second, and third parts of his invention, "and so much of the fourth part of the same invention as consists in the condensation, combination, and crystallization of vapours and gases arising from sewage matter;" and described his invention as follows: "My invention consists in the use and application of a chemical agent for the purpose of precipitating the solid animal and vegetable matter contained in sewage water." He further stated that, "for the purpose of precipitating the animal and vegetable matter contained in the sewage water, I prefer to employ hydrate of lime, commonly termed slacked lime, which, so far as I know, is the cheapest and the most efficient chemical agent for effecting this purpose" (making no mention of "the carbonate of lime and some others of the alkaline earths," &c., mentioned in the specification). The disclaimer concluded as follows: "What I claim of my invention is, the precipitation of animal and vegetable matter from sewage water by means of the chemical agent hereinbefore described."

On behalf of the plaintiff, evidence was given to show that the process used by the Local Board of Health at Hitchin was identical with that claimed by the plaintiff as his invention; and also that his invention was new, useful, and valuable. On behalf of the defendant it was contended that there had been no infringement of the plaintiff's patent: and evidence was given to show that the system pursued by the Local Board was to separate the greater part of the sewage matter from the water by filtration, and then to apply hydrate of lime to the water, for the purpose of deodorizing it. It was proved that the hydrate of lime, so applied, did cause some precipitation of the animal and vegetable matter which remained in the sewage water even after such filtration. It was also proved that the sediment which was procured by the filtration was not sold by the Local Board, but was carted away by persons who were paid for so doing. Evidence was also given to show that the alleged invention of the plaintiff was not new.

The learned Judge told the jury that, if the chemical agent (in this case hydrate of lime) was applied by the Local Board with a knowledge that one effect would be to precipitate the matter still left in the sewage water, the board must be considered to have applied it for that purpose, although their object were, not to precipitate, but to deodorize: and that they had, in that case, infringed the plaintiff's patent, although the greater part of the sewage matter had been separated by filtration from the water before the hydrate of lime was used.

The jury found that the Local Board had infringed. The learned Judge then asked the jury, at the request of the counsel for the plaintiff, whether, if the patent was to be construed as a patent, not for the use of a chemical agent generally, for the purpose of precipitating, but for the use of hydrate of lime for that purpose, they were of opinion that there had been an infringement by the Local Board. The jury found that there had. Leave was reserved to move as after mentioned.

Lush, in last Easter Term, obtained a rule calling on the plaintiff to show cause why a verdict should not be entered for the defendant, or a nonsuit, "on the grounds: 1st. That the undisclaimed part of plaintiff's alleged invention is not a matter for which letters patent can by law be granted; 2d. That the plaintiff's specification is too large, inasmuch as it claims any and every chemical agent whatever, without specifying or particularizing the same; 3d. That the plaintiff's specification does not state the particular chemical agent to be employed, nor the mode in which the same is to be employed:" or why there should not be a new trial, "on the grounds: 1st. That there was no evidence of an infringement of plaintiff's patent; 2d. That the learned Judge misdirected the jury in telling them that the user of hydrate of lime for the purpose stated in the defendant's evidence was an infringement of the plaintiff's patent; 3d. That it was proved that the alleged invention was not new, and was well known to others, and publicly and generally practised in the United Kingdom before the date and grant of the plaintiff's letters patent."

Yesterday and this day,

*535] **Bovill, Hindmarch, and C. Pollock* showed cause.—First, as to the motion to enter a verdict for the defendants, or a nonsuit. Taking the specification and the disclaimer together, the result is, a claim by the plaintiff of the use of hydrate of lime only: or, at all events, of hydrate of lime in preference to any other chemical agent. The substance is "the chemical agent hereinbefore described," mentioned in the disclaimer, and which, in the disclaimer, the plaintiff declares "I prefer to employ." It is not a claim for a mere principle; the *modus operandi* is specified. The proportion used is not specified; but that varies with the density of the sewage water: no further detail is possible. As to the rule for a new trial. The defendant contends that, if all that the plaintiff claims is the use of hydrate of lime, the invention is not new. But the evidence, even of the defendant's own witnesses, showed that the use of hydrate of lime as a precipitating agent was new. And that was the mode in which the defendant employed it, although the precipitation was the less in consequence of the sewage matter being thinned to some extent by mechanical means before the hydrate of lime was mixed with it. It seems to have been understood by the Court of Exchequer Chamber, in *Steiner v. Heald*, 6 Exch. 607,† that the question whether a process is new may be determined by the novelty of the result produced. In *Crane v. Price*, 4 M. & G. 580, 602, 3 (E. C. L. R. vol. 43), (a) Tindal, C. J., applies the result as a test; and so does Cockburn, C. J., in *Booth v. Kennard*, 1 H. & N. 527, 531.† Here the precipitation from running sewage water is new. There was no misdirection in law as to the infringement; nor

(a) S. C. Webster's Reports, &c., on Letters Patent, 377, 409.

was the verdict contrary to the *evidence. The defendant contends that he used the process for the purpose of deodorizing [*536 only; and that the precipitation, which unavoidably, by the laws of nature, accompanied such use, was not within the plaintiff's purpose. The plaintiff's patent was for obtaining manure by a particular process: by the same process the defendant did in fact obtain the manure; only he did not use it because he did not want it. It is an infringement if a party use a new part of a patented process in combination with a different process: *Bovill v. Keyworth*, 7 E. & B. 725 (E. C. L. R. vol. 90); *De La Rue v. Dickenson*, 7 E. & B. 738. Were it otherwise, there could be no patent for a new watch movement. *De La Rue v. Dickenson* also shows that the question of infringement is for the jury. [CROMPTON, J.—Can the jury be supposed here to have found more than that there was some precipitation in fact?] Surely the patent cannot be evaded by throwing away the manure. [Lord CAMPBELL, C. J.—Not if that be merely colourable.] The jury, at this stage, must be presumed to have found that it was merely so. The pure water could not be produced except by effecting a precipitation.

Webster and Garth, contra.—The precipitate has been produced, but not sold. Even exposure to sale is not sale: *Minter v. Williams*, 4 A. & E. 251 (E. C. L. R. vol. 31). The patent is not for producing a precipitate: that has been done whenever quicklime has been used. [Lord CAMPBELL, C. J.—There may be a patent for producing, by precipitation, a saleable article: but, if that be so, there is no infringement. ERLE, J.—The intention to produce a profitable matter is of the essence of a patent.]

*Lord CAMPBELL, C. J.—There is no evidence of infringement [*537 here.

COLERIDGE and ERLE, Js., concurred.

CROMPTON, J.—I concur. As to the objection that the patent is void for want of novelty, I am much inclined to say that the patent may be supported: here is a process producing a new result; that is, manure in a particular form. It can hardly be said that there cannot be a patent for that. Rule absolute for a new trial.

LEWIS v. LEVY. June 4.

The rule, that the publication of a fair and correct report of proceedings taking place in a public Court of justice is privileged, extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge, terminating in the discharge, by the magistrate, of the party charged.

A declaration for libel set out, in three separate counts, reports of three separate days' proceedings, respectively (on two adjournments), before a magistrate; the report of the first day stating that plaintiff was charged with perjury, and an adjournment, but reserving the report; the report of the second day also stating an adjournment in language intimating that there would be a report of the proceedings of the day to which the adjournment was; and the third stating the discharge of the party charged: and the jury found generally that the reports were fair and correct. Held: that the reports of the first two meetings did not lose the privilege by reason of the proceedings there reported not being final.

One of the reports commenced, "Wilful and corrupt perjury." Held that, after the verdict of the jury, this must be taken as a description of the nature of the charge, not as an imputation, by the publisher, of the perjury in fact.

One of the reports stated that the evidence before the magistrate entirely negated the story of the plaintiff, which story was the statement of the plaintiff in which the imputed perjury was contained. Held, not to be privileged; and a plea, justifying this report on the ground that it was a fair and correct report of the proceedings which had taken place, was held bad after verdict.

THE first count charged that defendant heretofore, to wit, on 26th June, 1857, falsely and maliciously printed and published of the plaintiff, in a newspaper called *The Daily Telegraph*, the words following (that is to say): "Guildhall. Wilful and corrupt perjury. Mr. Edward Lewis" *538] (meaning the plaintiff), "the *manager of a loan office in Fetter Lane called *The Tradesman's and Mechanics' Loan Society*, appeared on a summons before Alderman Rose, to answer a charge of wilful and corrupt perjury alleged to have been committed by him in this Court in some proceedings taken by Mr. Lewis against Mr. John Edward Collett for obtaining the sum of 30*l.* by means of false representations. Mr. Pattison, for the complainant, applied for an adjournment, to compel the attendance of two witnesses, one of whom was alleged to have been an outlaw; which, it was stated, incapacitated him from giving evidence. Mr. Giffard, for the defendant, opposed the adjournment, unless it was shown there was reasonable expectation of procuring the attendance of the witnesses. After some further discussion, the witnesses were ordered out of Court; and ultimately examined, one by one: after which the case was adjourned. But, as the publication of what transpired might frustrate the ends of justice, we reserve our report until the next hearing."

Second count. For that defendant afterwards, to wit, on 4th July in the year aforesaid, falsely and maliciously printed and published of the plaintiff, in the said newspaper called *The Daily Telegraph*, the words following (that is to say): "Guildhall. Wilful and corrupt perjury. A man of the name of Edward Lewis" (meaning the plaintiff), "who conducts a loan shop at 16 Fetter Lane on behalf of Maria Foster, his sister, and styles it *The Traders' and Mechanics' Loan and Discount Company*, appeared before Alderman Rose, upon a summons charging him with wilful and corrupt perjury, alleged to have been committed by him in evidence which he gave in this Court, on the 3d of June last, in support *539] of a charge which he preferred against John Collett, for obtaining money under false pretences. The case arose out of some transactions between Mrs. Bass (who was described as the divorced wife of the town clerk of Dover) and the defendant; in the course of which she represented herself as a widow, in a declaration she made respecting the property she offered as security for loans prior to August last. In that month she negotiated a loan through Mr. Collett with the defendant, who advanced the money upon a warrant of attorney jointly signed by Mrs. Bass and Mr. Collett: and, upon default being made in the payment by instalments, he entered up judgment for the full amount of the loan, and arrested Mr. Collett, who was released, a few days afterwards (some time in March), upon affidavit being made by Mrs. Bass before a Judge at Chambers; upon which the defendant" (meaning the now plaintiff), "preferred the charge against Mr. Collett for obtaining the sum of 30*l.* under false pretences; alleging that Mr. Collett told him, at the time he applied for the loan, that Mrs. Bass was still a widow, and that he, Lewis" (meaning the plaintiff), "never knew she

was a married woman until she made the affidavit in March last which released Mr. Collett from prison. He" (meaning the plaintiff) "also said that, if he had known she was a married woman, he would not have advanced the loan, notwithstanding he had taken the precaution to have the additional security of the warrant of attorney. Evidence was given by Mrs. Bass and Mr. Gaden, which entirely negatived Lewis's" (meaning the plaintiff's) "story, and satisfied this Court that Lewis" (meaning the plaintiff) "knew, from a conversation which took place in August last in the presence of Mr. Gaden, Mr. King, Mr. Collett, Mrs. *Bass, and the defendant" (meaning the now plaintiff), "that she was not a widow: and the summons was immediately dismissed: [*540 upon which an application was made that Lewis" (meaning the plaintiff) "should be forthwith committed for perjury. The magistrate declined taking such a summary course, and therefore granted a summons calling upon the defendant" (meaning the now plaintiff) "to answer that charge. And, on the 25th day of June last, the evidence was gone into, which was merely a repetition of that given for the defence of Mr. Collett; and the case was then adjourned until to-day; when Mr. Sleigh appeared for the prosecution, and Mr. Giffard for the defendant. Mr. Sleigh said Crown Office subpoenas had been obtained to compel the attendance of Mr. King and Mr. Gaden; but they could not be served; and he therefore proposed to call another witness and recall Mrs. Bass, to depose to another conversation which took place with the defendant" (meaning the now plaintiff) "at his office, and in which he" (meaning the plaintiff) "was informed that she was a married woman. Mrs. Bass was then called, and said, in August or September last, she could not remember the exact day, she went to the defendant's" (meaning the now plaintiff's) "office, with an occasional servant, of the name of Griggs, and in his hearing, amongst other matters, told the defendant" (meaning the now plaintiff) "that he" (meaning the plaintiff) "need have no apprehension about her security, as nothing could touch her furniture but rent and taxes, and Lewis's" (meaning the plaintiff's) "bill of sale, as she was a married woman. Richard Griggs said he accompanied the last witness to Lewis's" (meaning the plaintiff's) "office, which consisted of a large room with *part of it partitioned off for a private office. Mrs. [*541 Bass went in there; and he remained outside; but the partition was very thin; and the door was open. After Mrs. Bass had been there some time, she said to Lewis" (meaning the plaintiff) "that he was running no risk, as nothing could touch her furniture but rent and taxes, she being a married woman. Mr. Sleigh, upon this evidence, applied for a remand, to enable him to obtain the evidence of King and Gaden. Mr. Giffard opposed the application, on the ground of the expense to the defendant" (meaning the now plaintiff). "Alderman Rose said there was sufficient in the evidence for a remand, but not to justify him in committing the defendant" (meaning the plaintiff) "for trial in the present incomplete state of the case. The defendant" (meaning the plaintiff) "was then remanded on bail."

Third count. That defendant afterwards, to wit, on 18th July in the year aforesaid, falsely and maliciously printed and published of the plaintiff, in the said newspaper, the words following (that is to say): "The Fetter Lane Loan Office. Edward Lewis" (meaning the plaintiff), "the manager of Maria Foster's loan shop at 16 Fetter Lane, known as

The Traders' and Mechanics' General Loan and Discount Company, appeared, in discharge of his recognisance, to answer a charge of perjury, alleged to have been committed in evidence which he gave in this Court on the 3d of June last. The magistrate dismissed the summons, there not being sufficient evidence to secure a conviction. Meaning and insinuating that the plaintiff was guilty of wilful and corrupt perjury. *By means of which premises," &c. (Special damage).*

Pleas. 1. Not guilty.

*542] 2. That, before the printing and publishing by the *defendant of the said alleged libels in the declaration mentioned, or any or either of them, the plaintiff was summoned and appeared before a public Court of justice, to wit, before a justice of the peace then sitting and holding a public Court, to wit, at the Guildhall of the city of London, upon a certain charge of having unlawfully and wilfully committed wilful and corrupt perjury: and thereupon, upon the hearing of the said charge by and before the said justice, certain proceedings were had in the said public Court; and the further hearing of the said charge was then adjourned to a future day; and the hearing of the said charge was, by the said justice, afterwards from time to time further adjourned; and the said charge came on to be heard by and before the said justice in the said public Court at the said several adjournments, respectively; and certain proceedings were thereupon had, upon the said several hearings, respectively, by and before the said justice in the said public Court; he the said justice having lawful and competent power and authority to inquire into the said charge. That the said alleged libels, in the said declaration mentioned, and each and every of them, were and are true, fair, just, accurate, and correct accounts and reports of the said proceedings so had before such justice in the said public Court as aforesaid, and were made *bonâ fide* and without malice.

Issue on both pleas.

On the trial, before Lord Campbell, C. J., at the Middlesex Sittings after last Michaelmas Term, the publication of the matter set out in the three counts of the declaration was admitted: and, his Lordship having held that it was for the defendant to prove that the accounts of the proceedings were fair and correct, defendant proved the summons and all *543] the proceedings *before the magistrate. No special damage was proved. The plaintiff did not require that there should be a separate finding on any count, or on any particular part of any count, or that damages should be assessed on the issue upon the first plea, but insisted that, on the comparison of the facts proved with the publications, it appeared that the accounts were not fair. His Lordship left to the jury whether the reports were impartial and correct: and the jury found generally for the defendant. A verdict was entered for the defendant on both issues: and leave was reserved to plaintiff to move as after mentioned.

O'Malley, in last Hilary Term, obtained a rule calling on the defendant to show cause why judgment should not be entered for the plaintiff on the second plea, notwithstanding the verdict found for the defendant on that plea; and why the verdict found for the defendant on the first issue should not be set aside, and a verdict entered for the plaintiff on that issue instead thereof: "on the ground that the second plea is no answer to this action: and that therefore the verdict on the first issue,

which was entered for the defendant, on the ground that the matters stated in the second plea were a defence on the general issue, was erroneously entered."

In last Easter Term, (a)

Edwin James, and *Ballentine*, Serjt., showed cause.—The facts stated in the second plea show a good defence, both on that plea and on the issue of Not guilty. In *Curry v. Walter*, 1 B. & P. 525, the Court of Common Pleas held *that, in an action for libel, it was a good [*544 defence, under the plea of Not guilty, that the alleged libel was a true account of what had passed upon a motion in the Court of King's Bench for an information against two magistrates, for corruption in refusing to license an inn; the motion having been refused for want of notice to the magistrates. That is a conclusive authority for the defendant here, unless it has been overruled or can be distinguished. Probably no distinction will be attempted on the ground that the Court in that case was one of higher authority than the Court in which a magistrate sits to hear a preliminary investigation. It will be said that the proceeding was here *ex parte*. In *Rex v. Lee*, 5 Esp. 123, the defendants in a prosecution for libel offered evidence that the alleged libel consisted of the depositions taken before a magistrate upon his committing a party for trial on a charge of murder: Heath, J., held the evidence inadmissible: saying that, "putting the criminality of such proceeding out of the question, the evidence offered was *ex parte*; it was the deposition made by the prosecutor only. But he was of opinion, that the mere publication of *ex parte* evidence before a trial was of itself highly criminal." Here the proceeding before the magistrate was final, the plaintiff having been discharged. *Rex v. Fleet*, 1 B. & Ald. 379, may, at first sight, appear inconsistent with *Curry v. Walter*. There a criminal information was granted for publishing the evidence taken before a coroner's inquest which terminated in a verdict of wilful murder. But in that case the publication was accompanied by comments. [Lord CAMPBELL, C. J.—The moment comments are made, the immunity is gone.] *It is, however, true that Bayley, J., in [*545 that case, appears to rest his judgment, not merely on the fact of the comment, but also on the illegality of the publication of the evidence. *Duncan v. Thwaites*, 3 B. & C. 556 (E. C. L. R. vol. 10), may also be cited as inconsistent with *Curry v. Walter*, 1 B. & P. 525. There a plea was held bad on demurrer which averred that the alleged libel contained only a true, fair, and just report and account of proceedings which had taken place before a magistrate at Bow Street. The proceedings before the magistrate, in that case, terminated in the party charged being held to bail and the witnesses bound over to prosecute. Here the party was finally discharged. The publication, from time to time, of imperfect proceedings stands of course on a different footing; that was the case in *Rex v. Clement*, 4 B. & Ald. 218 (E. C. L. R. vol. 6). (b) So does the publication of what takes place before a magistrate, not in the course of regular judicial investigation, but upon some party applying to the magistrate for advice: what there takes place is *coram non judice*. In the late case of *Davison v. Duncan*, 7 E. & B.

(a) April 28th, and May 5th, 1858. Before Lord Campbell, C. J., Erle and Crompton, J. Wightman, J., was present during the latter part of the argument on the second day.

(b) See in the matter of *W. I. Clement*, 11 Price 68.

229, 231 (E. C. L. R. vol. 90), the general principle is thus set forth by Lord Campbell: "A fair account of what takes place in a Court of justice is privileged. The reason is, that the balance of public benefit from the publicity is great. It is of great consequence that the public should know what takes place in Court; and the proceedings are under the control of the Judges. The inconvenience therefore arising from the chance of the injury to private character is infinitesimally small as compared to the convenience of publicity." A distinction has sometimes *546] been suggested *between proceedings in a Superior Court and those before a magistrate, on the ground that the latter may, if he thinks fit, lawfully conduct the proceedings in private.^(a) But that, at any rate, appears to be inapplicable where the proceedings are in fact public, as in the present case. [Lord CAMPBELL, C. J.—The Superior Courts of common law have also the power of excluding the general public in certain cases: and it is occasionally exercised by Courts of equity.] If there be no distinction arising from the nature of the Courts, there can be none arising from the nature of the proceeding: the proceeding here was final, as in *Curry v. Walter*, 1 B. & P. 525, which has not been overruled; and in that case, as here, the proceedings were *ex parte*. It may be urged that here, in the course of the inquiry, something arose injurious to the character of the party. That, however, is no more than must often inevitably occur in legal proceedings. It is true that there is here an innuendo, suggesting that the defendant meant to impute wilful perjury to the plaintiff. [Lord CAMPBELL, C. J.—You may consider that as negatived by the verdict.]

Petersdorff, Serjt., *H. Mills*, and *Laxton*, *contra*.—First, the rule may be made absolute on grounds not requiring the decision of the general question. The heading of the article, "Wilful and corrupt perjury," gives the character of libel to the publication. [Lord CAMPBELL, C. J.—That may be no more than a statement of the nature of the charge. If you can show that the publication is necessarily, by law, a libel, you succeed: but, if you show only that it may be a libel, the verdict shows that it is not.] In *Lewis v. Clement*, 3 B. & Ald. *547] 702, the *declaration set forth an alleged libel, commencing, "Insolvent Debtors Court—Shameful conduct of an attorney," and then professing to give an account of a proceeding in that Court. The plea stated that the Court was a public Court of the King, and that the alleged libel contained a faithful and true account of the several proceedings there had. This plea was held bad on motion for judgment non obstante veredicto, on the ground that the defendant, by the prefatory words, had taken upon himself so to characterize the conduct of the plaintiff. [ERLE, J.—Would you object to a heading "charge of wilful and corrupt perjury"?] The present heading asserts a well-founded charge. Next, the publication in the first count is indefensible upon any view: it contains merely an account of a preliminary investigation, concluding with an adjournment. In the second count, the proceedings are described as ending in a remand on bail; and it is stated, as the opinion of the publisher, that the evidence entirely negatived the plaintiff's story. In the third, it is stated that the summons was dismissed, there not being sufficient evidence to secure a conviction: the evidence not being set out, but only the publisher's view of the result.

(a) See the judgment in *Duncan v. Thwaites*, 3 B. & C. 583 (E. C. L. R. vol. 10).

Eyre, C. J., on the trial of *Curry v. Walter*, 1 Esp. 456, said "that he would hold the defendant to very strict proof, that the report, as published, contained precisely the substance of that delivered in Court." And in *Lewis v. Walter*, 4 B. & Ald. 605, 612, Abbott, C. J., said: "If a party is to be allowed to publish what passes in a Court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence." As to the general *question: the rule allowing the publication of what passes in a Court of justice does not apply to the case of a proceeding before magistrates. [Lord CAMPBELL, C. J.—There may be a distinction between preliminary and final proceedings: but I do not understand how there can be one between different tribunals.] In the Superior Courts it is supposed that the public is present: and this is the foundation of the rule. At any rate the principle of disallowing ex parte proceedings will be found universally laid down: 1 Starkie's Treatise on the Law of Slander and Libel, &c., 265 (2d ed.); Holt's Law of Libel 161; Cooke's Treatise on the Law of Defamation 48; Borthwick's Treatise on the Law of Libel and Slander, as applied in Scotland 209; Roscoe's Evidence at Nisi Prius 543 (9th ed.). But, further, the privilege does not extend to the publication of proceedings of which the object is merely to determine whether or not a party is to be charged. That distinction was pointed out in *Cox v. Coleridge*, 1 B. & C. 87 (E. C. L. R. vol. 8), where it was decided that a party charged on a preliminary investigation before a magistrate was not entitled, as of right, to use the assistance of a professional advocate; and *Rex v. Borron*, 3 B. & Ald. 432 (E. C. L. R. vol. 5), is to the same effect. But that right is given, in cases of summary conviction, by stat. 6 & 7 W. 4, c. 114, s. 2. [Lord CAMPBELL, C. J.—I hold that enactment to be merely declaratory of the common law.] That seems to follow from *Daubney v. Cooper*, 10 B. & C. 237 (E. C. L. R. vol. 21). The same distinction is pointed out in *Burn's Justice*, vol. 1, p. 979 (29th ed.), *Conviction*, III.; *ib.* vol. 3, p. 1012, *Justices of the Peace*, VII. 4. [Lord CAMPBELL, C. J.—It is hardly necessary to advert to a distinction so obvious.] Again, as to ex parte proceedings, in *Hoare v. Silverlock*, 9 Com. B. 20 (E. C. L. R. vol. 67), where it was holden to *be a good defence that the alleged libel consisted of a fair and impartial report of a trial in a Court of justice, Maule, J., limited the privilege to "a fair account of proceedings in a Court of justice, not being ex parte, but in the hearing of both sides." That the publication of proceedings at a preliminary investigation terminating with the holding of the accused party to bail is not privileged was held in *Rex v. Fisher*, 2 Campb. 563. The same principle was upheld in *Regina v. Fleet*, 1 B. & Ald. 379, and *M'Gregor v. Thwaites*, 3 B. & C. 24 (E. C. L. R. vol. 10). [Lord CAMPBELL, C. J.—In that last case the magistrate was not exercising any jurisdiction: it was an instance of the scandalous practice then prevailing of professing to consult a magistrate in order to give notoriety to the statement made before him.] In *Charlton v. Watton*, 6 C. & P. 385 (E. C. L. R. vol. 25), Patteson, J., held that the publication of what passed before the Municipal Corporation Commissioners was not privileged. In *Davison v. Duncan*, 7 E. & B. 229 (E. C. L. R. vol. 90), where it was attempted to extend the privilege to the proceedings at a public meeting, Coleridge, J., asserted the qualification laid

down by Maule, J. The second plea here is bad : it alleges that the summons and appearance were before "a public Court of justice;" whereas it appears by the plea itself that there was only a preliminary inquiry before a magistrate, who had the right to exclude the public. by stat. 11 & 12 Vict. c. 42, s. 19, which indeed is in accordance with the previous decisions in *Rex v. Borron*, *Cox v. Coleridge*, *Rex v. Lee*, 5 Esp. 123, *Rex v. Fisher*, and *Duncan v. Thwaites*, 3 B. & C. 556 (E. C. *550] L. R. vol. 10). *The utmost extent to which the privilege can be upheld is where the proceeding is in a public Court, and final. Even as to *Curry v. Walter*, 1 B. & P. 525, it is evident that Lord Ellenborough, in *Rex v. Creevey*, 1 M. & S. 273, 279 (E. C. L. R. vol. 28), thought the decision, or at any rate the language there used, too strong: yet there the proceeding was in this Court, and final, and terminated in the dismissal of the application against the party charged. The language of Abbott, C. J., also, in *M'Gregor v. Thwaites*, 3 B. & C. 81 (E. C. L. R. vol. 10), must be considered somewhat to qualify *Curry v. Walter*. The principle of the privilege is that the publication only in effect extends the area of the Court; and, where the public has a right to be present in the Court personally, it is lawful to publish to the public what takes place there. But that ceases to apply where the Court is not public. In *Smith v. Scott*, 2 C. & K. 580, where Coleridge, J., applied the doctrine of privilege to a proceeding at a Judge's Chambers, the Judge was acting judicially on the question of discharging a bankrupt. *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

The declaration in this case contains three counts for three alleged libels on the plaintiff, published in a newspaper, called *The Daily Telegraph*, on the 26th of June, 1857, and on the 4th of July, and on the 18th of July following. Each alleged libel professed to give a report of what had taken place in a proceeding before a magistrate upon a charge of perjury against the plaintiff, which was preferred on the 25th *551] of June, and, after an *adjournment to the 3d of July, was finally dismissed on the 17th of July.

The defendant pleaded, First, Not guilty; and, secondly, a special justification, that the alleged libels were and are true, fair, just, accurate, and correct accounts and reports of certain proceedings had before a justice of peace in a public Court of justice on a charge of wilful and corrupt perjury against the plaintiff, which was dismissed.

At the trial, the question made between the parties was, Whether the reports of these proceedings which appeared in the defendant's journal were fair and correct reports. The publication of the alleged libels being admitted, the defendant's counsel contended that it lay upon the plaintiff to falsify them; but the Judge held that the onus was cast upon the defendant to prove that they were fair and correct. The defendant then gave in evidence the summons and all the proceedings before the magistrate upon the charge referred to, with all the depositions, and the adjournments by the magistrate, and his final adjudication dismissing the charge for want of sufficient evidence. There was no request on the part of the plaintiff that the jury should find separately on any of the counts, or on any particular part of either count, or that they should assess damages on the plea of Not guilty. The plaintiff's counsel, in his reply, complained chiefly of the suppression of some parts of

the cross-examination of the witnesses, which, he contended, were favourable to the plaintiff. The question as to whether the report was impartial and correct was left to the jury, with the observation that partiality and inaccuracy might be made out by suppression as well as by insertion. The jury retired, carrying along with them *the three [*552 newspapers containing the alleged libels, and all the depositions as taken down by the magistrate's clerk: and, on their return, they found generally for the defendant. The verdict was accordingly entered for the defendant on both pleas.

A few days after, an application on the part of the plaintiff was made, and granted, that execution might be stayed, on the authority of *Duncan v. Thwaites*, 3 B. & C. 556 (E. C. L. R. vol. 10), in which it had been held that the privilege accorded to reports of proceedings in Courts of justice does not extend to preliminary examinations before a magistrate on a charge of an indictable offence. And in the following Term a rule was granted to show cause why judgment should not be entered for the plaintiff on the second plea, notwithstanding the verdict found for the defendant on that plea, and why the verdict found for the defendant on the first issue should not be set aside and a verdict entered for the plaintiff on that issue instead thereof, on the ground that the second plea is no answer to this action, and that therefore the verdict on the first issue, which was entered for the defendant on the ground of the matters stated in the second plea being a defence on the general issue, was erroneously entered.

There seems strong reason for contending that the special plea is insufficient after verdict, on the ground that it is pleaded to the whole declaration, and there are matters in the second count of the declaration which cannot be considered as a report of what took place before the magistrate on the occasion referred to. But, if we were to give judgment depriving the defendant of *any benefit from this [*558 special plea, we can by no means order that the verdict found for the defendant on the first issue should be set aside, and a verdict entered for the plaintiff on that issue instead thereof.

It is a good defence to an action for a libel, that it consists of a fair and impartial (though not verbatim) report of a trial in a court of justice; and such defence is admissible under Not guilty, which puts in issue as well the lawfulness of the occasion of the publication as the tendency of the alleged libel: *Hoare v. Silverlock*, 9 Com. B. 20 (E. C. L. R. vol. 67). As far as the first and third count of the declaration are concerned, we cannot adjudge that the plaintiff is entitled to a verdict and to damages; for, according to what the Court decided on the validity of the sixth plea in *Duncan v. Thwaites*, 3 B. & C. 580 (E. C. L. R. vol. 10), there is strong ground for contending that at all events the defendant was entitled to a verdict on those counts. They contain no detail of the evidence, nor any comment upon the case, but "nakedly" state "the result of what the justice thought fit to do." The second count is much more objectionable; for it begins with professing to give an account of a former proceeding before the magistrate, in which the plaintiff was prosecutor, and out of which the charge of perjury against the plaintiff arose; and in this account the reporter takes upon himself to aver that the evidence adduced against the plaintiff entirely negatived his story. Such conclusions are wholly unjustifiable. And, where

the report of law proceedings has mixed up with it commentaries reflecting upon any of the parties whose names appear in it, it entirely loses the privilege which it might otherwise claim. Nevertheless, after the *554] course *which was pursued at the trial of this cause, and after the verdict of the jury, we think that we ought not to do more for the plaintiff in respect of this count than to allow a verdict to be entered for him upon it on the plea of Not guilty, unless we should be of opinion that the remainder of this count, which gives a detailed report of what took place before the magistrate upon the charge against the plaintiff on the 3d of July, although unaccompanied by the introductory statement, and although impartial and correct, could not in point of law be justified.

The plaintiff's counsel contended that the privilege of reporting legal proceedings must be confined to the superior courts of law and equity. But on such a question the dignity of the court cannot be regarded: and we must look only to the nature of the alleged judicial proceeding which is reported. For this purpose, no distinction can be made between a court of pie poudre and the House of Lords sitting as a court of justice. As to magistrates, if, while occupying the bench from which magisterial business is usually administered, they, under pretence of giving advice, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, reports of what passes before them are as little privileged as if they were illiterate mechanics assembled in an alehouse. Hence the well decided case of *M'Gregor v. Thwaites*, 3 B. & C. 556 (E. C. L. R. vol. 10). When magistrates are duly acting within their jurisdiction, questions of great importance and difficulty arise as to the publication *555] of the proceedings before them. It was contended at the bar *that in no case have the reports of proceedings before magistrates any privilege. To this general proposition we can by no means assent. Proceedings before magistrates under stat. 11 & 12 Vict. c. 43, with respect to summary convictions and orders, in which, after both parties are heard, a final judgment is given, subject to appeal, are, we think, strictly of a judicial nature: the place in which such proceedings are held is an open Court; (a) the defendant, as well as the prosecutor, has a right to the assistance of an attorney and counsel, and to call what witnesses he pleases; and, both parties having been heard, the trial and the judgment may lawfully be made the subject of a printed report, if that report be impartial and correct.

But the proceedings which we have to consider in the present case were before a magistrate acting under stat. 11 & 12 Vict. c. 42, "with respect to persons charged with indictable offences." By a summons, a charge was brought before an alderman of London at Guildhall against the now plaintiff for wilful and corrupt perjury; and an application was made that he might be committed to prison or give bail to take his trial for this offence. After several adjournments, and examining all the witnesses brought before him, the magistrate dismissed the summons. In three different numbers of the defendant's newspaper there were reports of these proceedings; all of which reports, after the verdict of the jury, we must suppose to have been impartial and correct, and published without malice.

(a) See sect. 12.

With respect to the alleged libels in the first and third counts (as we have already observed) the defence seems to be sufficient.

*The great doubt seems to be as to the report of the proceedings against the plaintiff in the second count of the declaration, which gives a true account of what had been done on the 3d of July, and sets out evidence injurious to the plaintiff, the charge against him being still pending. [*556

The decision of this Court on the second plea in *Duncan v. Thwaites*, 3 B. & C. 556 (E. C. L. R. vol. 10), is said to have determined the general doctrine that a correct report of the proceedings which took place in the court of a preliminary inquiry before a magistrate upon a charge of an indictable offence cannot be justified. But we must recollect that there the alleged libel contained a highly coloured statement of the reporter, evidently insinuating the guilt of the accused in having indecently assaulted a female child of thirteen years old, and attempted to violate her person. "The evidence of the child herself," "and her companion" "of the same age, displayed such a complication of disgusting indecencies that we cannot detail it." The second plea averred, generally, that the evidence of the child herself, and her companion of the same age, did upon that occasion display a complication of disgusting indecencies, and that the alleged libels contained no other than a fair and just report of the proceedings before the magistrate. Great stress was likewise laid by Lord Tenterden, in delivering the judgment of the Court, upon the fact that there "the proceeding in question terminated in the first instance by holding the accused" "to bail to take his trial before a jury. Such a trial therefore might be expected at the time of each of the publications." In the present case, the examinations terminated in the *dismissal of the summons; no other proceeding took place [*557 against the plaintiff; he did not commence his action till after the summons had been dismissed; and, although he alleges special damage by a pecuniary loss in his business, none was proved.

We are not prepared to lay down for law that the publication of preliminary inquiries before magistrates is universally lawful: but we are not prepared to lay down for law that the publication of such inquiries is universally unlawful. Although there are numerous obiter dicta, there is no decision to this effect. In the cases relied upon to establish the general doctrine, it will be seen that there were vituperative comments accompanying the statement of the evidence, or some aggravation attending the publication of the report, or some peril which was likely to be caused to the person complaining of it. Here we have a preliminary inquiry before a magistrate, which turned out to be unfounded, and was dismissed. If the whole inquiry had taken place before a magistrate during one hearing, would an impartial and correct report of the proceeding published in a newspaper next morning have been actionable? We think not. In *Curry v. Walter*, 1 B. & P. 525, it was decided, above sixty years ago, that an action cannot be maintained for publishing a true account of the proceedings of a Court of justice, however injurious such publication may be to the character of an individual. The alleged libel there consisted of a report in *The Times* newspaper of an application by Mr. Erskine in the Court of King's Bench for a rule to show cause why a criminal information should not be filed against magistrates for a conspiracy corruptly to refuse a license to a public-

house. *The rule was refused, on the ground that the magistrates had not been served with notice of the motion. The report truly set out the contents of the affidavits making the charge. One of the magistrates having brought an action for the alleged libel, it was tried before Eyre, C. J.; and he told the jury that, though the matter contained in the paper might be very injurious to the character of the magistrates, yet he was of opinion that, being a true account of what took place in a Court of justice, which is open to all the world, the publication of it was not unlawful. The verdict was for the defendant: and, a rule Nisi for a new trial having been granted and fully argued, the Judges of the Court of Common Pleas were all clearly of opinion that the action could not be maintained. Now this was an *ex parte* proceeding: whereas, in the case which we have to consider, the present plaintiff was fully heard before the magistrate, and had an opportunity to call what witnesses he chose on his behalf. Nor was the proceeding more final there than here; for the application to the King's Bench for a criminal information might have been renewed on an affidavit of notice given to the magistrates; and an indictment for the conspiracy might have been found by a grand jury. The difference to be relied upon must therefore be the difference of the tribunals. But, although a magistrate upon any preliminary inquiry respecting an indictable offence may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful, we conceive that, while he continues to sit *foribus apertis*, admitting into the room where he sits as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the *investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be), we think the Court in which he sits is to be considered a public Court of justice. The case of *Curry v. Walter*, 1 B. & P. 525, has been often criticised, but never overturned, and often acted upon. And in *Rex v. Wright*, 8 T. R. 293, 298, it received the unqualified approbation of that great Judge, Mr. Justice Lawrence, who observed that, though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. Therefore we think that a fair and impartial report of this proceeding against the plaintiff, supposing it to have been terminated in one day, would have been privileged. And, for the same reasons, an impartial and correct report of the proceedings at the three different hearings would have been privileged if published simultaneously on the 18th of July. We have therefore only to consider the effect, under the circumstances of the case, of there having been three publications instead of one.

Considering that the three taken together are found by the jury to have been a true and faithful and *bonâ fide* report of the proceedings against the plaintiff on this charge of wilful and corrupt perjury, we think that the second cannot be selected and taken separately to be a libel. Had there been no other notice of the *charge in the defendant's journal, it might well have been deemed malicious

and actionable. But the number of 26th June, after stating the adjournment, says, "as the publication of what transpired might frustrate the ends of justice, we reserve our report until the next hearing." From the number of 4th July it might reasonably be inferred that a report would subsequently be given of what should be done at the adjourned meeting: and the number of 18th July concludes the history by stating that the magistrate dismissed the summons. We do not see how, on principle, this is to be distinguished from the daily report in a newspaper of a criminal trial which lasts several days before the Court of Queen's Bench, or the Central Criminal Court, or at the Assizes. It has been adjudged that, if the due administration of justice is supposed so to require, the Court has authority to make an order against publishing any part of the trial till the whole is concluded. Nevertheless, where no such order has been made, the practice has long existed of daily publishing, without any disapprobation from the Court, each day's proceedings, till the trial is concluded. And in several instances this practice (which in reality only extends the area of the Court) has been found highly beneficial in the discovery of material evidence. But suppose that a newspaper had daily given an impartial and correct report of the whole of Frost's trial for high treason at Monmouth, which lasted many days: could an action have been maintained against the proprietor by selecting one number containing the opening speech of the attorney-general, or some material evidence against the prisoner? The law upon such subjects must bend to the approved usages of society, though still acting upon the same principle, that what is hurtful *and indicates malice should be punished, and that what is beneficial and bonâ fide should be protected. The decision of Chief [*561 Justice Eyre and his brethren in *Curry v. Walter*, 1 B. & P. 525, rested on sound legal principles, and is now almost universally approved of. On the same principles, we think we ought to hold in this case that no action can be maintained for any part of the impartial and correct and bonâ fide report of this proceeding against the plaintiff before the magistrate, which ended in the charge being dismissed; although, the proceeding being adjourned from day to day, the report appeared in portions in different numbers of the defendant's journal.

We give no opinion in favour of the general legality of publishing reports of preliminary examinations before a magistrate where the party accused has been committed or held to bail for an indictable offence; but we cannot join in the sweeping condemnation of police reports which has been pronounced obiter before the benefit arising from those reports had been fully experienced. We believe that they often lead to the detection and punishment of crime, and that they sometimes assist in the vindication of character. Against the severe denunciation of police reports by several eminent Judges may be placed the following opinion of Lord Denman, C. J., solemnly delivered by him before a select committee of the House of Lords, in the year 1843, on the law of libel. (a) "I have no doubt that" police reports * "are extremely useful for [*562 the detection of guilt by making facts notorious, and for bringing those facts more correctly to the knowledge of all parties interested in

(a) Report from the Select Committee of the House of Lords appointed to consider the law of defamation and libel, and to report thereon to the House; with the minutes of evidence taken before the Committee, &c. Minutes of Evidence, p. 125, Qn. 429.

unravelling the truth. The public, I think, are perfectly aware that those proceedings are *ex parte*, and they become more and more aware of it in proportion to their growing intelligence; they know that such proceedings are only in course of trial, and they do not form their opinion till the trial is had. Perfect publicity of judicial proceedings is of the highest importance in other points of view, but in its effects on character I think it desirable. The statement made in open Court will probably find its way to the ears of all in whose good opinion the party assailed feels an interest, probably in an exaggerated form, and the imputation may often rest on the wrong person; both these evils are prevented by correct reports."

One of the resolutions of this Court in *Duncan v. Thwaites*, 3 B. & C. 556 (E. C. L. R. vol. 10), lays down the doctrine that the report of a preliminary examination before a magistrate is unlawful where the party accused has been committed or held to bail for an indictable offence. Yet, as the actual pendency of a prosecution was a main ingredient in that decision, and here the party accused was neither committed nor held to bail, but absolved by the magistrate, we think that we are at liberty to hold that in this case the impartial and correct report of the proceedings was lawful.

Upon the whole, we give judgment that the verdict for the defendant on the second plea is no bar to this action; and we direct a verdict to be entered for plaintiff with 1s. damages on the plea of Not guilty to *563] the second count of the declaration; and that the verdict entered *for the defendant on the plea of Not guilty to the first and third counts of the declaration shall stand.

"Ordered: That a verdict be entered for the plaintiff with one shilling damages on the plea of Not guilty to the second count of the declaration; and that the verdict entered for the defendant on the plea of Not guilty to the first and third counts of the declaration do stand."

In *Donelly v. Proprietors of Public Ledger*, 2 Philada. Rep. 57, 93, it seems to have been assumed, if not held, that a fair and correct report of preliminary proceedings before a magistrate on a criminal charge, though the charge be afterwards withdrawn or dismissed, is not actionable; though it is otherwise in this case, as well as in those of reports of regular judicial proceedings, if the publication be accompanied with comments tending to asperse the character of the party libelled: *Id.*; *Commonwealth v. Blanding*, 3 Pick. 319; *Thomas v. Crosswell*, 7 Johns. 264.

MERCER v. IRVING. June 4.

Declaration on a bond for 300*l.* given by defendant to plaintiff. The declaration set out the condition, which recited that defendant and B. had practised in partnership the professions of surgeons, apothecaries, accoucheurs, and general medical practitioners at W., and were about to dissolve partnership; and that it had been agreed to dispose of their practice at W. to plaintiff for 150*l.*: and defendant and B. had agreed with plaintiff to enter into the bond, conditioned as therein mentioned, for the security of plaintiff against any risk of defendant or B. practising or introducing any other practitioner within the distances therein mentioned. And it was declared that, if either defendant or B. should within three years practise, or

attempt to practise, the professions of surgeon, apothecary, accoucheur, or general medical practitioner, or either of them, or carry on the business of chemist or druggist, within one mile from the parish church of W., or prescribe for any patient of plaintiff, or attempt to induce such patient to call in defendant, B. or any other medical practitioner than plaintiff, or induce any other medical practitioner to practise within one mile, &c., or introduce any one who should so practise as surgeon, &c., within such distance to any patient of plaintiff, or if defendant or B. should, within ten years, carry on the business of chemist or druggist, or open a surgery, or place for dispensing medicine, or be connected with any one opening, &c., within one mile, &c., or if B. should underlet or assign his dwelling-house at W. to any physician, surgeon, &c., or suffer any person practising, &c., to reside there before 13th February then next, "then, and in any or either of the said cases, if the defendant or the said" B., their executors, &c., "or either of them, did and should forthwith well and truly pay unto the plaintiff the sum of 300*L.*, the said bond should be void." There was no express stipulation that the bond should be void if the defendant and B. abstained from doing the acts, nor that the bond should in any case stand good. Breaches were assigned: and the jury found that the defendant had practised within the mile, and had not paid any part of the 300*L.*; and they assessed the damages in respect of this breach at 25*L.*

Held: that plaintiff was entitled to recover the whole sum of 300*L.*

THE declaration alleged that defendant by his bond became bound to plaintiff in the sum of 300*L.*, to be paid by defendant to plaintiff, which bond was subject to a condition thereunder written: whereby, after reciting that the defendant and one William Alexander Bryden had carried on and practised in partnership the *professions of sur- [*564 geons, apothecaries, accoucheurs, and general medical practitioners, at Lamberhurst and Wadhurst; and that they were about to dissolve such partnership; and that, upon the treaty for the dissolution thereof, they had entered into an agreement to dispose of a portion of the said practice then carried on at Wadhurst aforesaid to the plaintiff, at the price of 150*L.*; and that the defendant and the said W. A. Bryden had agreed with the plaintiff to enter into the above bond, conditioned, as therein mentioned, for the security of the plaintiff, and every person to whom he, his executors or administrators, might at any future time assign or make over his said profession or practice, against any risk of the defendant or the said W. A. Bryden, or either of them, practising or introducing any other practitioner within the distances therein mentioned: it was declared that, if either of them, the defendant or the said W. A. Bryden, did or should, within the period of three years from the 26th day of June, 1854, either alone or in copartnership with any other person or persons whomsoever, practise or attempt the professions of surgeon, apothecary, accoucheur, or general medical practitioner, or either of them, or carry on or engage in the business of a chemist or druggist within the distance of one mile in any direction from the parish church of Wadhurst aforesaid: or if either of them, the defendant or the said W. A. Bryden, by himself or themselves, or through any other person or persons whomsoever, shall, within such three years as aforesaid, attend or prescribe for any of the patients of the plaintiff, or of any person or persons to whom he, the plaintiff, or his executors or administrators, might at any future time assign or dispose of such his practice as therein aforesaid, or should *induce or solicit, or [*565 attempt to induce, any of such patients or professional connections of the plaintiff, or such assignee or assigns, to employ, consult, or call in either of them, the defendant or the said W. A. Bryden, or any other medical practitioner than the plaintiff or such his assign or assignee, or should induce or solicit, or attempt to induce, any of such patients or professional connections of the plaintiff, or such assignee or assigns as

aforesaid, or should induce or solicit any other medical practitioner to set up or engage in practice within such distance of one mile from the said parish church of Wadhurst as aforesaid, or should introduce any medical practitioner who should practise or set up as a surgeon, apothecary, accoucheur, or general medical practitioner, or as a chemist or druggist, as aforesaid, within such distance as aforesaid, to any of the patients or professional connections of the plaintiff, or such assignee or assigns as aforesaid, or if either of them, the defendant or the said W. A. Bryden, should, within the period of ten years from the date aforesaid, engage or carry on the business of a chemist or druggist, or open a surgery or other place for the preparation or dispensing of medicine, or be connected, directly or indirectly, with any person opening such a surgery or place for the preparation or dispensing of medicine within one mile of the parish church of Wadhurst aforesaid; or if the said William Alexander Bryden should underlet or assign his term or interest in the dwelling-house and premises then in his occupation at Wadhurst aforesaid to any physician, surgeon, apothecary, accoucheur, or general medical practitioner, or to any chemist or druggist, or permit or suffer any person practising or carrying on any such professions or *566] trades to reside *therein before the 13th day of February then next; then, and in any or either of the said cases, if the defendant, or the said W. A. Bryden, their executors or administrators, or either of them, did and should forthwith well and truly pay unto the plaintiff the sum of 300*l.*, the said bond should be void. And afterwards, and before suit, the defendant committed divers breaches of the condition of the said bond, in this: that he, within the said period of three years, practised and attempted to practise the profession of surgeon, apothecary, accoucheur, and general medical practitioner, and carried on and engaged in the business of a chemist and druggist, within the aforesaid distance of one mile, and, within the said period of three years prescribed for patients of the plaintiff, and solicited and induced patients and professional connections of the plaintiff to employ, consult, and call in the defendant, or some other medical practitioner than the plaintiff, and induced and solicited, and attempted to induce and solicit, the patients and professional connections of the plaintiff not to employ or call in the plaintiff, and introduced a medical practitioner who practised and set up as a surgeon, apothecary, accoucheur, and general medical practitioner, and as a chemist and druggist, within such distance of one mile, to the patients and professional connections of the plaintiff, contrary to the condition of the said bond. Yet no part of the said sum of 300*l.* hath been paid.

Pleas. 1. That defendant did not commit the alleged breaches of the bond, or any or either of them. Issue thereon.

2. As to the alleged breaches in this, that defendant, within the period of three years, practised, and attempted to practise, the profession of a *567] surgeon, apothecary, and *accoucheur and general medical practitioner, and carried on and engaged in the business of a chemist and druggist within the distance of one mile as in the declaration mentioned; that, after the said alleged breaches, and before the suit, defendant delivered to plaintiff, and plaintiff received of defendant, a sum of money in satisfaction and discharge of the breaches pleaded to. Issue thereon.

New assignment of similar breaches to those pleaded to in plea 2. Issue on the new assignment.

On the trial, before Williams, J., at the last Sussex assizes, the jury found that the defendant had, within the time, and within the mile, practised, and had not paid any of the 300*l.* As to the other breaches they found for defendant. And, being directed by the Judge to assess the actual damages, they found them to be 25*l.* The learned Judge then directed a verdict to be entered for 300*l.*, giving leave to move as after mentioned.

Ballantine, Serjt., in last Term, obtained a rule calling on the plaintiff to show cause why the verdict should not be reduced to 25*l.*, "on the ground that that amount was properly assessed by the jury."

Bovill and *J. A. Russell* now showed cause.—The damages were here clearly liquidated. The latest authority on the point is *Reynolds v. Bridge*, 6 E. & B. 528 (E. C. L. R. vol. 88), a case very closely resembling the present. It was there held that the sum named was to be taken as liquidated damages, because none of the covenants to which it applied was capable of precise estimation: and that is the case here. [ERLE, J.—It was there considered that the damage could not be measured by the fee payable *in a particular case.] That was so: and that applies here: the damage in fact was here only 25*l.*; but the [*568 general damage by the loss of practice could not be estimated. It is true that here the words "liquidated," "unliquidated," "damages," do not occur: the question arises upon the condition which avoids the bond if the defendant should practise and pay 300*l.* In *Sainter v. Ferguson*, 7 Com. B. 716 (E. C. L. R. vol. 62), the agreement was not to practise "under a penalty of 500*l.*:" yet this was held to be liquidated damages. [Lord CAMPBELL, C. J.—In *Reynolds v. Bridge* the deed expressly excluded the supposition that the sum named was a penalty. CROMPTON, J.—How do you take the bond and condition out of the enactment of stat. 8 & 9 W. 3, c. 11, s. 8?] The only assessment of damages which can be made on the breaches found must be 300*l.*: the question is as to the meaning of the parties. It is impossible to alter the words of the condition, and substitute, for the 300*l.*, "such damages, not exceeding 300*l.*, as a jury may assess." [CROMPTON, J.—It would seem that, if the defendant is right, he might have to pay (for instance) 200*l.* several times over: (a) but that is inconsistent with the form of the condition.] The intention was that, if the defendant practised, he was to pay the 300*l.*, and that was to put an end to his obligation. [Lord CAMPBELL, C. J.—The words "in any or either of the said cases" seem to be in your favour. COLERIDGE, J.—Yet in *Kemble v. Farren*, 6 Bing. 141 (E. C. L. R. vol. 19), such words were considered to operate the other way.] There appears to be nothing unreasonable in this estimate of *the damages: it is not as if 300*l.* were to be paid for the non-payment of 10*l.*: all is uncertain. [CROMPTON, J.—In cases of [*569 contract, as where a breach of a charter-party is complained of, you may prove damages larger than the sum named. That would have been so in *Kemble v. Farren*. Here the form of the condition precludes that. There would have been no doubt if the sum named in the bond had been 600*l.* and that in the condition 300*l.*] The case would then have been clear: yet there can be no difference in principle. In *Galsworthy v.*

(a) See Lord Mansfield's judgment in *Lowe v. Peors*, 4 Burr. 2225, 2228.

Strutt, 1 Exch. 659,† a covenant not to exercise within certain limits the profession of an attorney, and, in cases of infringement of the covenant, to pay 1000*l.*, “as and for liquidated damages, and not by way of penalty,” was held to be a case of liquidated damages. There Parke, B., said that there was much good sense in Lord Mansfield’s remarks in *Lowe v. Peers*, 4 Burr. 2228: “Upon this distinction they proceed in Courts of equity. They will relieve against a penalty, upon a compensation: but where the covenant is ‘to pay a particular liquidated sum,’ a court of equity cannot make a new covenant for a man; nor is there any room for compensation or relief. As in leases containing a covenant against ploughing up meadow; if the covenant be ‘not to plough;’ and there be a penalty; a court of equity will relieve against the penalty, or will even go further than that (to preserve the substance of the agreement): but if it is worded—‘to pay 5*l.* an acre for every acre ploughed up;’ there is no alternative, no room for any relief against it; no compensation; it is the substance of the agreement. Here, the specified *570] sum of 1000*l.* is found in damages: *it is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages.”

Prentice, *contra*.—No doubt the real question is as to the intention of the parties. The condition here creates a defeasance of the bond: and the question is, on what terms is the bond avoided. It is argued that, inasmuch as the payment of the 300*l.* is made the condition for the avoidance of the bond in the event of the occurrence of the acts against which the bond was to be a security, that fixes the sum payable for damages at 300*l.* But the payment of the 300*l.* would have avoided the bond, which is for 300*l.* only, without any stipulation at all: the mention of the sum is therefore only *ex abundanti cautela*. [COLERIDGE, J.—I do not see how you can strike out the 300*l.* ERLE, J.—You cannot say that the meaning is that the bond is to be void upon the defendant practising within the limits.] Suppose the words “then and in either of such cases,” and the words immediately following, were omitted. [COLERIDGE, J.—Then the condition would be that the bond should be void upon the defendant practising within the distance named. Had there been a clause avoiding the bond upon the defendant forbearing so to practise, your argument might have been well founded. ERLE, J.—Is it not possible that parties may choose to stipulate for a single payment, out and out, of 300*l.* in case of a single instance of such practice?] It is so, certainly. [ERLE, J.—Then how could such an intention have been expressed, otherwise than as this condition is expressed?] In *571] *Reynolds v. Bridge*, as has been pointed out, the language *expressly provided for liquidated damages and against the bond being construed as merely naming a penalty. [Lord CAMPBELL, C. J.—The instrument there was of a structure quite different.] It was so: and no instance has been cited where the naming of a sum in a bond has been construed as a designation of liquidated damages. Comyns begins with defining an obligation thus: “An obligation is a deed, whereby a man binds himself under a penalty to do a thing. If he be bound without a penalty it shall be called a single bill:” Com. Dig. *Obligation* (A). Damages must be assigned and assessed under stat. 8 & 9 W. 3, c. 11, s. 8. [Lord CAMPBELL, C. J.—That relates to actions upon any bond “or on any penal sum.”] The bond here is for the

performance or non-performance of certain things: and it is so treated in the declaration. It could not be meant that for any one of the acts mentioned in the condition, whether done knowingly or not, 300*l.* was to be paid.

Lord CAMPBELL, C. J.—I am of opinion that the plaintiff is entitled to recover the whole sum of 300*l.* If there were an agreement with a stipulation that for every infraction of the agreement, whether great or little, a certain sum should be paid, there would be nothing illegal in that; and no Court would interfere to prevent the enforcement of such an agreement; indeed it may be very reasonable that, when a business is bought and sold in this manner, the purchaser should secure himself from any disturbance by naming a fixed sum. If that be so, we are to consider whether this instrument does not contain such an agreement. Its form is very peculiar; I never saw such a form before. It is rather in the nature of a penal bill, an engagement to pay a *certain sum on a certain event. If it were drawn in the usual form, with an obligation to pay 300*l.*, and a condition that upon such and such things not being done the bond was to become void, otherwise to remain in full force, I should have thought the sum named was a penalty, and that the plaintiff could recover only to the amount of the damage for infraction of the agreement. But it is not so framed. The bond is for 300*l.*; and the condition is that, if the obligee shall do certain things, or any or either of them, and pay 300*l.*, the bond shall become void. Is not that intimating that for any infraction of the agreement the 300*l.* is to be paid? Then the agreement will be at an end, and the defendant may practise as much and wherever he chooses. On the rational and grammatical construction of the instrument I find nothing to lead to a different view; and I know of no authority the other way. In the cases to which we have been properly referred the instruments have not been in the same form as this. I find that here the 300*l.* is the ascertained sum payable on the doing of any one of the acts. [*572]

COLERIDGE, J.—I am of the same opinion. For a long time it has been considered that the true rule is to ascertain, as well as we can, from the language used by the parties, what their intention is. The authorities are all discussed in *Reynolds v. Bridge*, 6 E. & B. 528 (E. C. L. R. vol. 88). It was there said, I think, at any rate I would say now, that it is difficult to reconcile all the cases. We are therefore more safe in following the meaning of the parties. If you construe this instrument according to the ordinary meaning of the *words, the bond is to remain in force unless, on the doing of any of the acts provided against, 300*l.* be paid: it is not said that the bond is to be void on the non-doing of the acts provided against. That being the mutual meaning, is there anything on the face of the instrument to control it? Reliance seems to be placed on the circumstance that some of the matters provided for are slight, and that some breaches of the agreement might even be made unintentionally. There is, no doubt, weight in that consideration. But, when we look on the other side, the result seems to be the opposite way. The stipulations are provisions for uninterrupted enjoyment throughout a small area; and they point out how much is to be considered an interruption. It is idle to say that, if the defendant attends a single patient within the area, the loss of the emolument in the particular case measures the damage [*573]

resulting from the breach. It is impossible to say how much the damage might be: and it is therefore agreed that for any breach the compensation shall be that which the clause constitutes as the measure.

ERLE, J.—I also am of opinion that the plaintiff is entitled to recover for 300*l*. The expression of the instrument is unusual. The framer of it has departed from the ordinary form, and has expressed himself in words incapable of being mistaken. Unless the defendant pays the 300*l*. the bond is not to be void. And that is very reasonable: the plaintiff stipulates, not only to have back the 150*l*. which he has paid, but another 150*l*., which will scarcely indemnify him. Had the instrument said, "If you break the agreement you shall pay 300*l*.," it would *574] have been perfectly clear. But it goes further, *and says, "If you break any one of the articles of the agreement, you shall pay the 300*l*." That is its effect; and it is impossible to get over the meaning without altering the words. Then, the meaning of the words being clear, on what ground are we to depart from it? According to my observation, no rule can be more important than that of giving effect to the intention of parties. The late cases are very clear: *Hitchcock v. Coker*, 6 A. & E. 438 (E. C. L. R. vol. 38); *Reynolds v. Bridge*, 6 E. & B. 528 (E. C. L. R. vol. 88); *Green v. Price*, 13 M. & W. 695,† in Exch.; (a) *Atkyns v. Kinnier*, 4 Exch. 776;† *Galsworthy v. Strutt*, 1 Exch. 659.† In all these cases, the parties had stipulated for the payment of a given sum on a breach of the agreement. The difficulty that there would have been in estimating the amount of actual damage made it very reasonable to say, "If you break the agreement, you shall pay the sum mentioned." My brother Crompton (b) wished me to say that he doubts whether this is not an inaccurately expressed bond.

Rule discharged.

(a) Affirmed, on error, in Exch. Ch., *Price v. Green*, 16 M. & W. 346.†

(b) Crompton, J., had left the Court during the argument.

*575] *HALE v. BATES, Public Officer, &c. June 5.

On an action by B. against E., H., an attorney, having been required by E. to attend as a witness in London, had come from the country to London for the purpose. E. told H., after he had been in London one day, that he might return to his residence; but, before H. did so, H. was subpoenaed by B., and told that he must attend in obedience to B.'s subpoena. H. accordingly remained from home five days from the service of the subpoena, then went home, and afterwards returned to London, where he afterwards remained for five days up to the trial. The verdict was for E. After the trial, E. paid H. his expenses, and an allowance for time, for eleven days, on condition that, if any part was disallowed on the taxation between the parties, H. would repay so much to E. On the taxation between B. and E., E.'s attorney deposed, in his affidavit of increase, to this payment to H., but did not mention the condition. B., at the taxation, objected to the allowance of the sum paid in respect of the time during which H. was not detained at the request of E.; and the Master struck off so much as related to five days; and H. returned that sum to E. Then H. sued B. for his expenses and time in respect of the five days.

Held, that H. was entitled to recover this from B., the repayment by H. to E. having been proper, and having placed H. in the same position as if he had never received from E. the sum so repaid.

DECLARATION by plaintiff against defendant, as public registered officer of The West of England and South Wales District Banking

Company: For that the company were indebted to plaintiff for moneys payable by the company to plaintiff for work and labour, journeys and attendances, by him performed and given as a witness, at the request of the company, upon the trial of a certain cause then pending in Her Majesty's Court of Queen's Bench, in which defendant, as such public officer, was plaintiff, and Arthur Hallam Elton, Baronet, was defendant; and for fees due and owing from the company to plaintiff for and on account of his attendances as such witness; and for work and labour done and performed by plaintiff for the company; and for money paid by plaintiff for his travelling and other expenses in and about and in consequence of his attendance as such witness on such trial; and upon accounts stated.

Plea: Never indebted. Issue thereon.

On the trial, before Erle, J., at the last Spring Assizes *for Surrey, it appeared that the action was brought to recover 18*l.* 2*s.* 4*d.* [*576 for five days' attendance by plaintiff in London from 8th to 12th December, 1857, inclusively, as witness in a case in which Bates, the present defendant, as public officer, was plaintiff, and Sir Arthur H. Elton defendant; and for five days' expenses and railway fare. The plaintiff was an attorney, residing at Bath: he came to London from Bath on 7th December, for the purpose of being a witness for Elton; and Elton's attorney took down his evidence on 8th December, and told him he might go back to Bath, and would be telegraphed for when he was wanted. But, before he left London, he was, on the evening of 8th December, subpoenaed by the attorney of Bates, who then paid him 1*l.* 1*s.*, and required him to attend. On 9th December, plaintiff was subpoenaed also by the attorney of Elton. The first day of the London Sittings for which the cause of Bates *v.* Elton was set down for trial was 8th December. The plaintiff went back to Bath on 12th December, and returned to London on 14th December. He remained in London till the trial of Bates *v.* Elton, which took place on 19th December, and on which trial Elton had a verdict. After the trial, plaintiff sent to the attorney of Bates a claim for 35*l.* 18*s.* 10*d.*: being 34*l.* 13*s.* for eleven days' attendance at 3*l.* 3*s.* per day; 2*l.* 6*s.* 10*d.* for railway fare and back; from which 1*l.* 1*s.*, the sum paid with Bates's subpoena, was deducted. Bates's attorney tendered to him 12*l.* 16*s.* 10*d.*: being 1*l.* 1*s.* per day, for hotel expenses, for eleven days; and 2*l.* 6*s.* 10*d.* for travelling expenses; from which 1*l.* 1*s.*, the sum paid with the subpoena, was deducted. The plaintiff refused to accept the sum. The costs between party and party, in the case of Bates *v.* Elton, were *afterwards taxed. Elton's attorney, in his affidavit of increase, deposed [*577 that he had paid 36*l.* 19*s.* 10*d.* to Hale as a witness; being 23*l.* 2*s.* for his attendance; 11*l.* 11*s.* for his expenses; and 2*l.* 6*s.* 10*d.* for railway expenses: and he claimed this sum in the taxation against Bates. Bates's attorney objected to the allowance of part of this sum, on the ground that Elton's attorney was not bound to pay Hale for more than the days during which he was detained for Elton. The Master, being of opinion that for five of the days the detention was at the requisition of Bates's attorney, struck off 15*l.* 15*s.* in respect of three days. The plaintiff then repaid the 15*l.* 15*s.* to Elton's attorney, and brought the present action against Bates. At the trial of this action, he swore that the 36*l.* 19*s.* 10*d.* was paid to him by Elton's attorney on condition that

he should repay to Elton's attorney so much of that sum as the Master might disallow in the taxation between Bates and Elton; and that he had repaid the 15*l.* 15*s.* in compliance with that condition.

(On evidence of these facts, the defendant's counsel contended that the plaintiff was not entitled to recover, inasmuch as he had already been fully paid by Elton's attorney, and could not acquire a fresh right by voluntarily repaying what he received; and that the condition annexed to the original payment was illegal, as against Bates. The learned Judge was, however, of opinion that the objections failed, and that Hale was, as to the payment in respect of the five days, in the same position as if he had never received it from Elton. The jury found a verdict for 5*l.* 7*s.* 6*d.*, the learned Judge reserving leave to the defendant to move as after mentioned.

*578] *Lush*, in last Easter Term, obtained a rule calling on *the plaintiff to show cause why a nonsuit should not be entered, "on the ground that the plaintiff's repayment must be taken to have been voluntarily made, and be in the same position as if he had retained it;" or why a new trial should not be had on the ground of surprise as shown by affidavit.

Ogle now showed cause.—The tender may be laid out of the question, there being no plea but Never indebted; the tender does not show that no debt ever existed. The question therefore is whether, on the ground that the plaintiff voluntarily repaid 15*l.* 15*s.* to Elton, who had in mistake paid that sum, which included the sum now claimed, to the plaintiff, the plaintiff has lost his right of recovering from the present defendant. But that defence, too, is inadmissible under Never indebted. Till the plaintiff received the money from Elton there was, at any rate, a debt. It cannot be disputed that the defendant is *prima facie* bound to compensate the plaintiff for expenses and his loss of time during the five days, unless indeed, as to allowance for time, the law now is as it was at the time of the decision of *Collins v. Godefroy*, 1 B. & Ad. 950 (E. C. L. R. vol. 20), where it was held (in 1831) that an attorney attending as a witness is not entitled to remuneration for loss of time from the party who has subpoenaed him. But now, by the Directions to the Masters of the Courts, in Reg. G. H. 16 Vict., (a) there is to be an allowance of from 2*l.* 2*s.* to 3*l.* 3*s.* per diem, besides travelling expenses, to professional men who come from a distance. And, even as to the payment by Elton, the plaintiff, as he had no right to claim the sum paid, was bound to return it.

*579] **C. Pollock*, contra.—The defendant does not dispute the general rule that now, as between a party and the witness whom he subpoenas, the witness has a claim for loss of time. But the claim of the plaintiff here was satisfied by Elton's payment; the contract between the witness and the party who summons him is only that such party will pay to the witness so much of his claim for time, expenses, &c., as he does not get from the opposite party. [COLERIDGE, J.—Suppose you take the facts to be that Elton paid too much to the plaintiff, and, on this being discovered, the plaintiff repaid Elton. How would that destroy the plaintiff's claim on the defendant?] The whole transaction of payment and repayment here appears to have been a trick to enable the attorney of Elton to make his affidavit of increase. [ERLE,

(a) 1 E. & B. App. lxxv. (E. C. L. R. vol. 72).

J.—Suppose Elton's attorney had paid the money to the plaintiff absolutely and without condition; and then, on the Master taxing off a part, had sued the plaintiff to recover back what had been paid; and, upon such suit, the plaintiff had repaid the money.] The attorney could not have maintained such action, the mistake being one of law not of fact. Besides, the attorney and the plaintiff, by what they have done, have altered the situation of a third party: that being so, the plaintiff cannot disaffirm his original acceptance of the money as due to him from Elton: *Montefiori v. Montefiori*, 1 W. Bl. 363. As between the attorney and the present plaintiff, the facts will be taken to be as those parties, for the purpose of deceiving a third party, represented them to be: *Sims v. Tuffs*, 6 C. & P. 207 (E. C. L. R. vol. 25); *Alner v. George*, 1 Campb. 392. The condition to the making of which the plaintiff swore is such as the *law will not countenance: nothing could be more mischievous than a payment thus made and received on the speculation of the result of the taxation. What would have been the decision of the Master if this condition had been disclosed to him? The practice, if allowed, would destroy the real value of the affidavit of increase.

(Lord CAMPBELL, C. J., had left the Court.)

COLERIDGE, J.—This case has been argued with great ingenuity: but I feel no doubt. I see no pretence for a new trial on the ground of surprise. The other point is much more important. I abstain from expressing any approbation of what has been done in the Master's office; for, without saying that it was fraudulent, I must say that I should not have liked to have made the affidavit which has been brought before us. I further concede that, if there had been fraud producing injury to the defendant, I should have said that the plaintiff must have been bound to take the facts as he had represented them to be. That is the distinction between the present case and *Montefiori v. Montefiori*; the authority of which I do not dispute. The facts here are that Hale was kept in town for eleven days; he has a right to be remunerated in some way. On minute examination, it turns out that it was only for a certain portion of that time that he was detained by Elton's attorney, and that Bates' attorney detained him for the residue. Elton gets the verdict, and has a right to tax costs against Bates. The payment of the witnesses constitutes one part of the costs. A bill is drawn up by Hale *against Bates for 36*l.* odd. When Elton's attorney comes before the Master, it appears that both he and Hale are under a mistake as to the sum which is to be allowed to Elton in respect of his payment to Hale. The Master accedes to Elton's view that an allowance is to be made, but says that he will not allow enough to cover the whole demand, because, during a portion of the time, Hale was not detained by Elton's attorney. That left a certain part of what Elton's attorney had paid to Hale which it was Hale's duty to pay back, even without any undertaking. Now cannot Hale recover this money as against Bates? *Prima facie* he is entitled to recover it, because he has been kept in town by Bates for a certain number of days. For these, it is true, he has been paid; but wrongfully; and this he has been obliged to repay. Is there then anything in the circumstances to destroy his right? It is not contended that, if the money had not been paid by Elton's attorney, the plaintiff could not have recovered it from Bates. The money was, however, paid on the condition that, if the Master did

not allow it in taxation against Bates, Hale would repay it. It seems to me that these circumstances do not take away Hale's right against Bates. Although it is true that the plaintiff could not be paid by both parties, yet, after the Master had distinguished the sums to be paid by each party, he was entitled to claim the several portions against the respective parties. I think, therefore, that there is no ground for this rule.

ERLE, J.—I also think that this rule should be discharged. There is no pretence for saying that there is any surprise. Then what are the essential facts? Hale was subpoenaed by both parties, and stayed in town *eleven days; but Elton's attorney had told him that he *582] might go back: therefore for five of the days he was not detained at the request of Elton's attorney, but by the command of Bates's attorney, who said that he must obey the subpoena. At the time when the costs were taxed between party and party, Elton's attorney had paid for the eleven days in good faith: he could not be said to have paid in bad faith; for his object was to charge Bates and make him pay. When the case is before the taxing Master, Bates comes forward, and insists upon the payment not being allowed, because Hale was not detained at Elton's request: and, upon Bates so insisting, the Master taxes the sum off. Then Hale pays back to Elton the sum taxed off in respect of the five days, because, when the payment was made to him, it was made a condition that he should repay it if it should be disallowed on the taxation. Now, whether that was legal or illegal in the sense of its being that which might be enforced or not, I do not say: but I have no scruple in saying that, if I had been in Hale's place, I would have repaid the money. I say nothing of the condition which had been imposed: but, if he got the money by mistake, then, as an honest man, he did right to pay it back. He then comes to Bates, and calls upon him to pay: and Bates says he will not pay. Upon the pleadings, which raise only the issue of Never indebted, Mr. *Ogle's* answer is good: there was once a debt at any rate. But I would give Mr. *Pollock* the benefit of any plea that can be suggested, a plea, for instance, showing that Hale was satisfied, having been paid by the opposite party. I am of opinion that such a plea would have been answered by showing that Bates prevented *583] Elton from being allowed on taxation the *payment for the five days. The defence therefore failed. Then was there anything illegal in what took place? Was Bates's position changed? No principle of that sort was in fact applicable. Here Bates's attorney brought the whole claim upon himself by making the objection. But on this record there is not even a semblance of defence.

(CROMPTON, J., had left the Court.)

Rule discharged.

The QUEEN on the Prosecution of the Poor Law Board v. STOCKTON and Others, Directors of the Poor of ST. PANCRAS. *June 5.*

The proviso to sect. 197 of the Metropolis Local Management Act (18 & 19 Vict. c. 120), which excepts from the jurisdiction of parish auditors appointed under the Act all accounts which, before the passing of that Act, would have been subject to the audit of an auditor appointed

under stat. 4 & 5 W. 4, c. 76, is not repealed by sect. 3 of stat. 19 & 20 Vict. c. 112: and the Poor Law Commissioners have therefore still the right to order the overseers or guardians of any parish to appoint an auditor to audit the poor law accounts.

A select vestry, under a local Act (59 G. 3, c. xxxix.), annually elected forty of their own body to be "directors" of the poor, who were, by the Act, to exercise the functions of "overseers." The vestrymen were to appoint, and fix the salaries of, all the parish officers, and the visitors for the relief of the poor; but all these officers, and the visitors, were to be paid by, and act under the control and direction of, the directors. The vestrymen were to make, levy, and assess the rates; but the distribution of the moneys thence arising, including the portion devoted to the relief of the poor, was in the directors.

Held, that the directors, and not the directors and vestrymen jointly, were the parties filling the position of "guardians or overseers" of the parish, within stat. 4 & 5 W. 4, c. 76, ss. 46, 109: and that therefore the order of the Poor Law Commissioners, for the appointment of a poor law auditor for the parish, was rightly directed to the directors alone.

MANDAMUS to the "directors" of the poor of St. Pancras, commanding them to make an order to appoint an auditor to examine and audit, allow and disallow, the accounts relating to the poor-rate of the parish, under stat. 4 & 5 W. 4, c. 76.

The writ suggested that the relief of the poor within *the parish, and the management of the officers of the said parish, [*584 before and at the time when the order of the Poor Law Board therein-after mentioned came into operation, were and still are regulated by stat. 59 G. 3, c. xxxix.:(a) that the said Act contains provisions for the election or appointment of vestrymen of the said parish, and for the nomination and appointment by the said vestrymen of forty persons, to be and to be called directors of the poor of the said parish, who are thereby authorized to exercise in the said parish all the powers and authorities which overseers of the poor are or shall be by law authorized to exercise, and to contract for the maintenance and employment of the poor of the said parish, and to provide a convenient stock of materials for the employment of the said poor, and are otherwise appointed and entitled to act as managers of the poor of the said parish, and in the distribution or ordering of the said poor from the poor-rate of the said parish; that in the said Act are contained provisions for the appointment of collectors of the poor-rate of the said parish, treasurers and other officers, and for the payment by the said directors of salaries to such officers, in which directors all moneys arising from the rates and assessments for the relief of the poor of the said parish, and all goods, materials, and things provided for the use of the poor of the said parish are, by the said Act, vested; and which said directors are by the said Act required to meet weekly, for the purpose of putting into execution the powers vested in them by the said *Act; and power is [*585 therein contained for summoning and holding special meetings of the said directors for the like purpose. That the said Act remains in force, except so far as the same has been altered, as to the election of vestrymen and auditors of accounts, by the adoption by the said parish of stat. 1 & 2 W. 4, c. 60,(b) and by the operation of the other general Acts thereafter mentioned. That the said parish adopted the said Act, 1 & 2 W. 4, c. 60, before the passing of the Metropolis Local

(a) Local and personal, public: "For establishing a select vestry in the parish of St. Pancras, in the county of Middlesex, and for other purposes relating thereto." The sections material to the argument will be found at p. 588, note (b).

(b) "For the better regulation of vestries, and for the appointment of auditors of accounts, in certain parishes of England and Wales."

Management Act (18 & 19 Vict. c. 120), and before the making of the said order of the Poor Law Board thereafter mentioned. That the vestrymen of the said parish, and directors of the poor, have from time to time been appointed in pursuance of the provisions of the said local Act, until the said adoption of stat. 1 & 2 W. 4, c. 60, and in pursuance of the said provisions as altered and modified by that Act, until the coming into operation of the said Metropolis Local Management Act, and, from that time, as altered by that Act, or the Act amending the same (19 & 20 Vict. c. 112), and that there still are such vestrymen and directors. That, there being no auditor for auditing the accounts in the said parish relating to the relief of the poor appointed under stat. 4 & 5 W. 4, c. 76, or any Act incorporated therewith, the Poor Law Board, under the authority of that Act, and of the several statutes in that behalf made and provided, on 14th May, 1857, did duly make and issue, and send to the parties addressed, a certain order, sealed, &c., addressed to the directors of the poor of St. Pancras, to the church-wardens and overseers of the poor of the said parish, to *the clerk or clerks to the justices of the petty sessions held for the division or divisions in which the said parish is situate, and to all others whom it might concern, ordering that the directors of the poor of the said parish of St. Pancras should within two calendar months of the date of the said order appoint a fit and proper person to examine and audit, allow or disallow, the accounts in such parish relating to the poor-rate thereof, to be termed an auditor, &c.: and that no such appointment had been made in pursuance of the said order.

Return: That, after the passing of the said local Act, there had been and yet is a certain body corporate, by the name of "the vestry of the parish of St. Pancras, in the county of Middlesex," constituted and incorporated under the Metropolis Local Management Act (18 & 19 Vict. c. 120); that the said order of the Poor Law Board was made, issued, addressed, and sent after the passing of the last-mentioned Act: that the said parish adopted and acted upon stat. 1 & 2 W. 4, c. 60, before 1st January, 1844: and that the said parish contained a population exceeding 20,000, according to the last Parliamentary returns, before 9th August, 1844: and that always, since the coming into operation of stat. 19 & 20 Vict. c. 112, there had been and yet are auditors for the said parish elected under stat. 18 & 19 Vict. c. 120. That therefore the directors could not appoint an auditor to examine, &c., the accounts relating to the poor-rate of the said parish, as directed by the order.

Demurrer. Joinder.

Tomlinson, in support of the demurrer.—The defendants contend, first, *587] that the Poor Law Board has no power to order the directors to appoint an auditor; secondly, that the order is wrongly directed. As to the first point: stat. 4 & 5 W. 4, c. 76, s. 46, gives power to the Poor Law Commissioners to order the overseers or guardians of a parish to appoint officers for ordering accounts; and sect. 109 defines an auditor to be "every person," other than justices, "appointed or empowered to audit, control, examine, allow, or disallow the accounts of any guardian, overseer, or vestrymen, relating to the receipt or expenditure of the poor-rate." The power of the Commissioners, and of the auditors appointed by their direction, is confirmed and expanded by

sect. 32 of stat. 7 & 8 Vict. c. 101.(a) Then, stat. 18 & 19 Vict. c. 120, s. 1, repeals the provisions of stat. 1 & 2 W. 4, c. 60, (Hobhouse's Act), which had been adopted by the parish of St. Pancras, and which, by sect. 33, provided for the election of auditors; and therefore, no doubt, auditors of the *parish* accounts must be elected under sect. 11 of stat. 18 & 19 Vict. c. 120: but that section does not mention *poor law* accounts; and, further, sect. 197 expressly excludes from the operation of sect. 11 accounts which, if that Act had not been passed, would have been subject to the audit of any auditor appointed under stat. 4 & 5 W. 4, c. 76. Now it is clear that the poor law accounts of St. Pancras fall within this exception; for the fact that, as stated in the return, auditors have been appointed previously, under the local Act, does not affect the power of the Commissioners to appoint an auditor under stat. 4 & 5 W. 4, c. 76. [Lord CAMPBELL, C. J.—You contend that there may be two auditors, with different functions?] Yes. [Lord CAMPBELL, C. J.—Suppose *some* of the functions *of the auditor, under the local Act, were the same as those of the auditor under the general [*588 Act.] It has been decided that in that case each must take an account; *Regina v. The Poor Law Commissioners (Allstonefield Incorporation)*, 11 A. & E. 558 (E. C. L. R. vol. 39). That was a case under Gilbert's Act (22 G. 3, c. 83); but the same principle has been since laid down in cases where the parishes were under local Acts: *Regina v. Governors of St. Andrew*, 6 Q. B. 78 (E. C. L. R. vol. 51), *Regina v. Governor, &c., of Poor of Bristol*, 13 Q. B. 405 (E. C. L. R. vol. 66), and *Regina v. Tyrwhitt*, 2 E. & B. 77 (E. C. L. R. vol. 77). [Lord CAMPBELL, C. J.—The test appears to be, whether the powers of the two auditors are coextensive. *Atherton*, *contra*.—The defendants do not contend that they are: they contend that stat. 19 & 20 Vict. c. 112, s. 3, repeals the exception in sect. 197 of stat. 18 & 19 Vict. c. 120.] It certainly does not repeal it expressly; nor is there anything in its language to show that it refers at all to the auditing of poor law accounts. And, if there were such a repeal in terms, the proviso at the end, which excepts from the operation of the section all powers which, before stat. 18 & 19 Vict. c. 120, were vested in or might be exercised by any “guardians, governors, trustees, or commissioners,” would except the appointment of a poor law auditor for this parish. Secondly, the defendants contend that the order ought to have been directed to the “vestry and directors,” not to the directors only. That depends upon what parties, under the local Act, are “the overseers or guardians” of the parish, to whom under stat. 4 & 5 W. 4, c. 76, s. 46, the order is to be directed. (b)

(a) “For the further amendment of the laws relating to the poor in England.”

(b) By sect. 3 of stat. 59 G. 3, c. xxxix., the vicar and churchwardens and certain of the vestrymen are, with seven new vestrymen, appointed vestrymen for carrying the several powers and authorities of the Act into execution; and are to constitute a select vestry, and, in addition to the powers conferred on them by the Act, to have all the powers of the former open vestry, which the inhabitants of the parish at large are to cease to exercise.

Sect. 19 enacts that it shall be lawful for the said vestrymen, at any of their meetings duly convened for that purpose, to elect and appoint one or more person or persons, being a resident householder or householders in the said parish, to be a collector or collectors of the rates authorized to be made, collected, and levied by virtue of the Act; and also to elect and appoint some person or persons to be treasurer or treasurers, and also to elect a master or mistress of the workhouse, and one or more beadle or beadles for the removal of the poor from time to time, and for other purposes relative to the said poor, and to the concerns of the said parish; and also to elect and appoint such visitor or visitors, agent or agents, as they shall deem neces-

- *589] *The directors represent both overseers and guardians. They are, it is true, selected by the vestrymen under *sect. 41 of the
 *590] local Act; but they are expressly made overseers by sect. 46:
 *591] and sect. 109 of stat. 4 & 5 W. 4, *c. 76, defines "guardian" as meaning and including "any visitor, governor, director, man-

sary, for inquiring into the state and circumstances of the poor, dispensing casual relief, and inspecting the supplies and management of the workhouse, under the special instructions of the said vestrymen, and of the directors of the poor thereafter mentioned; and also to elect and appoint some clergyman or clergymen of the church of England to instruct such persons as shall be maintained in such workhouse in the principles of the established church of England, and to perform the service of the said church in the said workhouse, and also to visit the sick and perform other duties of his profession in the workhouse; and also to elect and appoint such clerk or clerks, and other officers and servants as they shall deem necessary for the execution of the Act; and direct such security to be taken from all such persons so elected and appointed, as the said vestrymen shall think proper, for the due execution of their office, and from time to time to remove such collector or collectors, treasurer or treasurers, master or mistress, beadle or beadles, visitor or visitors, agent or agents, clergyman or clergymen, clerk or clerks, and other officers and servants, at the will and pleasure of them the said vestrymen; and out of the rates and assessments to be collected and received by virtue of the Act, to make such allowances by way of poundage to the said collectors, not exceeding 4d. in the pound on the moneys actually collected, for their trouble in the collection of the rates aforesaid; and also to allow unto such master or mistress, beadle or beadles, visitor or visitors, agent or agents, clergyman or clergymen, clerk or clerks, and such other person or persons, not being a treasurer or treasurers, to be employed by the said vestrymen as aforesaid, such salaries and other recompense or remuneration yearly or otherwise, for his, her, and their trouble, as to the said vestrymen shall seem meet and reasonable, and from time to time to revoke and countermand, alter and vary such nominations and appointments, salaries or recompense, and make others in their stead, as to them shall seem meet and proper; all which salaries and allowances shall be paid by the directors thereafter directed to be appointed, out of the moneys thereafter appropriated for that purpose.

Sect. 21 enacts that all and every collector or collectors of any rates, assessments, or moneys which shall have been imposed or levied under the authority or direction of the former Acts, or either of them, or otherwise, and also all and every collector or collectors of the several rates or assessments, and moneys to be imposed and levied under this Act, and also every clerk, surveyor, inspector, or other officer, by whom any moneys shall be or have been received under the authority or for the purposes of the said former Act or of this Act, or otherwise, and also all and every surveyor or surveyors of highways heretofore appointed or hereafter to be appointed within the said parish, shall, at all times when thereunto required by the directors to be appointed by virtue of this Act, or any five or more of them respectively, make up and render unto the said directors, at such of their meetings as they shall direct for that purpose, a full, true, and perfect account in writing, with all the necessary vouchers for the confirmation thereof, of all moneys by such collector or collectors, clerk or clerks, surveyor or surveyors, or other officer or officers received for or on account of any such rates or assessments, or otherwise as aforesaid; and such collectors shall produce their respective rate-books, in order that the said directors may be satisfied as to the sum or sums of money rated and assessed, received and to be received, and may give such directions respecting the same as they shall think proper; and the master or mistress of the said workhouse for the time being, acting under the said former Acts, or to be appointed under this Act, and each of them, shall, and he or she is hereby required once at least in every calendar month, to produce and lay before the said directors at some meeting, or before some committee of the said directors, to be appointed for that purpose, an account of all moneys by him or her received and paid in the course of the preceding month, or at any time since such account shall have been last required and made out, and also a true and distinct account of the number of persons in the said workhouse, distinguishing their age and sex, and how such persons respectively are employed, and how much money has been earned by the labour of the said poor in the preceding month, or since the last preceding account; and what quantity of provisions, distinguishing every kind in weight or value, and also of beer, wine, and spirits, has been brought and delivered, and by what tradesman or tradesmen, into the said workhouse within the said preceding month or other period of time; and all and every such agent or agents, visitor or visitors, as aforesaid, acting under the said former Acts, or to be appointed under this Act, shall, and he and they is and are hereby required, at each and every weekly or other adjourned meeting of the said directors, to produce his, her, or their respective books before the said directors, in order that the same may be inspected and examined

ager, acting *guardian, *vestryman*, or other officer in a parish or union, appointed or entitled to act as a manager of the poor, and *in the distribution or ordering of the relief to the poor from the poor-rate, under any general or local Act of *Parliament." The rates under the local Act, although levied by the vestry, are,

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by them, and to give an account of all such moneys by such visitor or visitors, agent or agents respectively, received and paid in the course of the preceding week; and such collectors, clerks, surveyors, inspectors, agents, visitors, and other officers, and master and mistress as aforesaid respectively, shall and they are hereby required, within ten days after they shall respectively quit their office, to deliver up to the said directors all books, papers, and writings in their hands necessary to illustrate their accounts, or which may be demanded or required by the said directors, or any committee of them, authorized for that purpose, and to pay over to the said directors, or to the treasurer, all and every such balance of moneys as shall then appear to be and remain in their hands respectively by virtue of their respective offices: Provided always, that all the officers acting under the said former Acts shall account in the manner prescribed by the said Acts, as applicable to the irrelative cases, in the mean time and until the meetings of the directors under this Act shall commence: Provided also, that all books, papers, and documents heretofore possessed or kept by the vestry clerk of the said parish, or any other person or persons, relative to the affairs or concerns of the open vestry of the said parish, shall at such time after the passing of this Act as the said vestrymen or any five of them shall require, be delivered up to the said vestrymen or such person or persons as they shall for that purpose appoint.

Sect. 22 provides for proceedings before justices, upon complaint of the directors, against officers who refuse to account.

By sect. 25 the treasurer is to pay money received by him under the Act according to the order of the directors.

Sects. 26—40 provide, among other things, for the appointment by the vestrymen of churchwardens, sidemen, surveyors of highways, constables, sexton, and inspectors of weights and measures: and prescribe their powers and duties.

Sect. 41 enacts that the vestrymen shall, at their first meeting under the Act, or at some special meeting to be holden as therein directed, nominate and appoint forty persons, being vestrymen of the parish, to be and be called directors of the poor of the parish for carrying into execution the several powers given and intrusted to them by this Act: which directors are to continue in office for one year and until the appointment of their successors, to be made in like manner annually.

Sect. 42 enacts that the vicar and churchwardens are to be directors in addition to the forty.

Sect. 46 enacts that the directors and their successors shall and may exercise all the powers and authorities which overseers of the poor are or shall be by law authorized to exercise; but such directors shall, at their first meeting after their appointment, annually elect two or more fit and proper persons, to be "nominal overseers of the poor of the said parish," to be nominated and confirmed by two justices; and when and as soon as such appointment and confirmation shall have taken place, such nominal overseers shall and may institute or defend any appeal under any orders of removal, and issue or receive any notices respecting the same, as overseers of the poor are, by any laws in force or effect, empowered or required to do: and all notices and applications, directed by any Act or Acts of Parliament or otherwise, to be given or made to the overseers of the poor, with respect to the care and management or removal of the poor, or for any other purposes, shall be given and made to such nominal overseers: but in case any orders or notices shall happen by mistake to be given or sent to any churchwarden, or to the clerk or clerks of the said vestrymen at the said parish, the same shall be as valid and effectual as if given to such nominal overseers; and such churchwarden, clerk or clerks, shall forthwith deliver the same to such nominal overseers, or one of them, or to the agent or visitor of the poor for the time being, to be appointed as hereinbefore mentioned, or shall forfeit 40s. for his neglect: provided always, that when such visitor or visitors, agent or agents, shall be nominated and appointed as aforesaid, neither the churchwardens nor overseers of the said parish shall interfere or intermeddle in or with the care or management of the poor of the said parish in any case other than under the orders of the said directors, at their public meeting or meetings respectively. Provided also, that such nominal overseers, and such agents or visitors as aforesaid, shall severally and respectively act in all things under the control and direction of the said directors.

By sects 48, 49, the directors are empowered to make contracts for the workhouse, and for goods, provisions, &c., for maintaining, clothing, and employing the poor in the workhouse,

by sect. 69, vested in the directors; and the application of part of the money as a poor law fund is also given to them. In fact, sects. 48, 49, 53, 56, 59, 61—69, give to the directors all the executive powers of overseers under stat. 43 Eliz. c. 2, s. 1. The defendants will probably rely on sect. 19, which gives the vestry power to appoint, and “allow” salaries to, collectors, visitors, clerks, and other officers for the parish. But, by sect. 19, all those officers are to be under the control of the directors, and are to be paid by them. Moreover, the functions of those officers are not those of, or analogous to those of, an auditor of the poor law accounts: and, at all events, the power to appoint such auditor cannot be, as the defendants contend, in the directors and vestry jointly: it is either in the vestry alone, under sect. 19, or in the directors, by the general effect of the Act.

Atherton, contra.—The return is good. First, the Commissioners have now no power to order the appointment of a poor law auditor for the parish. The auditors of accounts for the parish, elected by the new vestry, under sect. 11 of stat. 18 & 19 Vict. c. 120, are, now in-

and for lodging, maintaining, and employing the poor; and to pay or order payment under these contracts.

By sect. 53 the goods, provisions, clothes, &c., for the poor are vested in the directors.

Sect. 55 enacts that all overseers of the poor, constables, beadle, and other parish officers for the time being, except the churchwardens and sidesmen, are to assist the directors, and obey their warrants and orders, on pain of a penalty to be recovered before a justice.

By sect. 56 the directors are to provide a convenient stock of materials for employing the poor.

By sect. 57 the directors are to take bonds for the due performance of offices, and for other purposes: and bonds already given to the churchwardens, overseers, or other parish officers, are vested in, and may be sued on by, the directors.

They are also empowered to remove vagabonds (s. 59); to take up vagrants (s. 61); to grant out-door relief (s. 62); to punish disorderly poor, and reward industrious poor (ss. 63, 64); and to bind children apprentices (s. 66).

Sect. 69 enacts that the vestrymen, at a meeting convened after due notice, are to make one or more such general rate or rates, assessment or assessments, as, by the several laws in force and effect, churchwardens and overseers of the poor now are, or shall or may, or could or might, be enabled or empowered to make, as the said vestrymen shall judge or determine to be necessary in or towards the relief and maintenance of the poor of the said parish, and other the several purposes that are, as well in this Act, as also in the several laws in force and effect touching and concerning the relief and maintenance of the poor, or in anywise relating thereto, particularly mentioned; and for paying all such sums of money as by any law in force and effect are directed to be paid out of any rate or rates made or to be made for the relief and maintenance of the poor; and that all moneys arising by such rates or assessments shall be and are thereby vested in the said directors; and that such moneys, together with all arrears due upon former rates and assessments, as well in the sinking fund rate as otherwise, shall be applied and disposed of; first, in payment of all the costs, charges, and expenses of collecting, levying, recovering, and managing the said rates, assessments, and moneys respectively; and secondly, in making such appropriations for the expenses of keeping highways in repair as hereinafter mentioned; and afterwards the overplus shall be applied to, for, and towards the relief and maintenance of the poor of the said parish, and for the several other purposes of this Act, and other purposes mentioned and described in the several laws in force and effect touching or concerning the relief and maintenance of the poor, or in anywise relating thereto; and for paying all such sums of money as by any law in force and effect are directed to be paid out of any rate or rates made for the relief and maintenance of the poor.

By sect. 70 the directors are empowered to appropriate a certain portion of the poor-rates to the repair of the highways.

By sect. 71 the collectors appointed by the vestrymen are to have power to levy the rates, and to execute distress warrants.

Sect. 83 enacts that such vestrymen in every year as have not been directors for the past year shall elect a committee of not less than seven, nor more than eleven, of such vestrymen to audit the accounts of the directors of the past year; and, if they disapprove of any parts, to bring them, by appeal, before the next quarter sessions.

vested with all the functions of the auditors formerly *appointed under the local Act. The proviso in sect. 197 of stat. 18 & 19 Vict. c. 120, which exempts from the jurisdiction of the parish auditors all accounts which, if that Act had not been passed, would have been subject to the audit of the auditor under stat. 4 & 5 W. 4, c. 76, is founded upon the exclusion, in sect. 90, of the powers and authorities relating to the relief of the poor from the jurisdiction of the new vestry. Then, sect. 3 of stat. 19 & 20 Vict. c. 112, which adds to the jurisdiction of such vestry all the duties and powers relating to the relief of the poor, which might have been performed by any vestry at the time of the framing of stat. 18 & 19 Vict. c. 120, practically repeals the proviso in sect. 197 of that Act, and brings the accounts relating to such relief also within the jurisdiction of the parish auditors. [Lord CAMPBELL, C. J.—The proviso is very express and pointed: it surely cannot be repealed by the general enactment of sect. 3. CROMPTON, J.—I do not see that either section touches the appointment of a poor law auditor.] As to the argument that the appointment of a poor law auditor for this parish is within the exceptions of the proviso in sect. 3 of stat. 19 & 20 Vict. c. 112, it is not inconsistent that the directors should still preserve this power under the local Act, and yet that the new vestry should have wider functions.

Secondly, the order, if it could have been made at all, should have been directed to the “vestry and directors.” The local Act contemplates the joint action of the two, as guardians of the poor, inasmuch as it vests in each certain powers for that purpose, which it does not vest in the other. For instance, by sect. 19 of the local Act, the vestrymen are to appoint visitors for the relief of the poor, who are to act under the special instructions of the *vestrymen and directors jointly. [CROMPTON, J.—By sect. 21 they are, as regards their accounts, to be under the control of the directors.] But the vestrymen have the appointment and removal of them. Sect. 46 enacts that the directors are to be the “overseers” of the poor: but that clearly means, subject to the whole Act; and, under the whole Act, some of the powers relating to the relief of the poor are in the vestry alone. Sect. 69, which empowers the vestry to make rates, is important as showing the nature of the functions to be exercised by the vestry; for the making rates is peculiarly the office of overseers and guardians. The vestry, therefore, under the local Act, having some powers, and the directors others, which are not possessed by both, the management was, before the passing of stats. 18 & 19 Vict. c. 120, and 19 & 20 Vict. c. 112, in that vestry and the directors jointly, and is, since these Acts, in the new vestry and the directors jointly, the new vestry having been substituted by these Acts for the old. The Commissioners, by directing their order to one of the two only, alter the relations of the local authorities of the parish; and the order is therefore bad: *Regina v. Poor Law Commissioners*, in re *St. Giles and St. George*, 17 Q. B. 445 (*E. C. L. R.* vol. 79). [Lord CAMPBELL, C. J.—Have the vestrymen here, under the local Act, any power to appoint auditors?] By sect. 83 the vestrymen are to appoint auditors for auditing the accounts of the directors. That at least shows that an order to appoint an auditor ought not to be addressed to the directors alone.

Tomlinson, in reply, was stopped.

*597] Lord CAMPBELL, C. J.—I am of opinion that the *return is bad. The Commissioners clearly have the power here to order the appointment of a poor law auditor, unless sect. 3 of stat. 19 & 20 Vict. c. 112, repeals the proviso in sect. 197 of stat. 18 & 19 Vict. c. 120. It seems to me impossible to put such a construction upon the former section. The proviso in sect. 197 of stat. 18 & 19 Vict. c. 120, excludes from the jurisdiction of the auditors under that Act all accounts which, before the passing of that Act, would have been within the jurisdiction of an auditor under stat. 4 & 5 W. 4, c. 76. That proviso appears to me to be quite untouched by sect. 3 of the supplemental Act. The powers, therefore, of the auditors under stat. 18 & 19 Vict. c. 120, and of those under stat. 4 & 5 W. 4, c. 76, are not co-extensive; and therefore the Commissioners have power to order the appointment of the auditors of the poor law accounts. I also think that their order is properly directed. It is unnecessary to go through the various sections of the local Act. It is admitted that the order must be directed to the directors; but it is contended that it ought to be directed to the vestrymen also. I am unable to gather from the local Act anything to show that the duties and authorities relating to the management and relief of the poor are vested jointly in the vestrymen and the directors. I think those duties and authorities are vested in the directors alone; they were intended to be the executive officers in the management and relief of the poor; and it would be quite contrary to the constitution of the parish if the order were directed otherwise than to them alone.

(COLERIDGE, J., was absent.)

*598] *ERLE, J.—I also am of opinion that judgment should be for the Crown. *Regina v. The Poor Law Commissioners (Allstonefield Incorporation)*, 11 A. & E. 558 (E. C. L. R. vol. 39), *Regina v. Governors of St. Andrew*, 6 Q. B. 78 (E. C. L. R. vol. 51), and the other cases cited, show that the power of the Poor Law Commissioners, under stat. 4 & 5 W. 4, c. 76, to direct the appointment of a poor law auditor was not affected by the existence of a power in the parish, under a local Act, to appoint an auditor of the parish accounts, if the functions of the two classes of auditors were not co-extensive. That power, therefore, exists here, unless it has been taken away by stat. 18 & 19 Vict. c. 120, or the amending Act, 19 & 20 Vict. c. 112. Now the proviso in sect. 197 of the former Act expressly excludes from the jurisdiction of the auditors appointed under it poor law accounts within the jurisdiction of an auditor under stat. 4 & 5 W. 4, c. 76; and therefore the poor law accounts of this parish. It is contended that this proviso is practically repealed by sect. 3 of stat. 19 & 20 Vict. c. 112. But I can see nothing in that section which can properly be construed as enacting or effecting such a repeal. Then, is the order properly directed? Sect. 46 of stat. 4 & 5 W. 4, c. 76, provides that it is to be directed to "the overseers or guardians" of the parish. Are the directors under this local Act "guardians," or "overseers," or both? They are constituted overseers by sect. 46 of that Act; and sect. 109 of stat. 4 & 5 W. 4, c. 76, clearly brings them within the definition of "guardians." I have attended carefully to the argument that the order should have been directed to the vestry and directors jointly; but I can find nothing

*599] in the local Act to show that the *vestrymen have the duties and authorities of guardians and overseers jointly with the directors:

at all events there is not evidence of such joint authority sufficient to warrant us in saying that the order should be directed to both vestrymen and directors.

CROMPTON, J.—I am also of opinion that the Commissioners have the power to appoint a poor law auditor, notwithstanding that the vestry have power, under a local Act, to appoint a parish auditor; that this power is expressly preserved under the proviso in sect. 197 of stat. 18 & 19 Vict. c. 120; and that this proviso is not repealed by sect. 3 of stat. 19 & 20 Vict. c. 112, the effect of which is merely to place the new vestry in the position of the old. Then, as to the direction of the order, I am clearly of opinion, looking at the local Act, and at sect. 109 of stat. 4 & 5 W. 4, c. 76, that the directors are the parties who occupy the position of guardians and overseers of the parish, and that the order is rightly directed to them alone. The vestrymen, no doubt, are, under the local Act, to do certain matters which are within the province of overseers, as, for instance, to make rates: but it is clear that, as regards the practical management and administration of the relief of the poor, the directors are practically the guardians and overseers.

Judgment for the Crown.

***The QUEEN v. THE GREAT WESTERN RAILWAY COMPANY. June 5. [*600**

Under the Metropolis Local Management Act (18 & 19 Vict. c. 120), sect. 161, the only rates which the vestry are authorized to make are a sewer's-rate, a lighting-rate, and a general rate: and no other rates but the sewerage and lighting rates can be made independently of and distinct from such general rate.

By a local Act (5 G. 4, c. cxxvi.), all hereditaments whatsoever in the parish of P. were made rateable upon one and the same scale to poor-rates: but in respect of paving, watching, and lighting rates under the Act, premises unoccupied, or in certain stages only of completion, were to be assessed respectively at certain lower rates than the rest.

Held that, under sect. 161 of The Metropolis Local Management Act, which provides that the several rates under that Act shall be assessed upon the same principle as the poor-rates in each respective parish, all hereditaments in P. were rateable upon one scale, without any exemption.

APPEAL by The Great Western Railway Company against a rate made by the vestry of the parish of Paddington, in Middlesex, on 7th October, 1856, whereby the company were assessed at 6d. in the pound for Poor, 1d. for Lighting, 3½d. for General, 1d. for Sewers; the whole assessment amounting to 1000*l.*(a) By consent, and by order of Cole-

(a)

Name of Occupier.	Name of Owner.	Description of Property rated.	Name and situation of Property.	Rateable value.	Poor 6d.	Lighting 1d.	General 3½d.	Sewers 1d.	Vestry premises ½d.	Total
The Great Western Railway Company.	The Great Western Railway Company.	The whole of the railway station, lands, buildings, and works finished and unfinished on September 22d, 1856.		£20,000	£500	£63 6 8	£291 13 4	£83 6 1	£41 13 4	£1000

ridge, J., a case was stated for the opinion of the Court, in substance as follows:—

The Great Western Railway Company are the owners and occupants of land and property in the parish of Paddington, parts of which constitute their principal terminus in London, and other parts of which are used as and for a railway, having lines of rails thereon. The property *601] consists of the railway, and also of erections and buildings embracing the general offices of the company, booking offices, platforms, and the usual accompaniments of a railway station for conducting a large traffic in passengers and goods. There are also unfurnished buildings intended for warehouses for goods; and some buildings which, though finished, have not yet been occupied or used. Some portion of the land and railway, and some of the buildings and erections, are not situate in any street, square, lane, or place which is paved, repaired, cleansed, or lighted by virtue of the local Act hereinafter mentioned, and have no ground paved or to be paved belonging to or lying before their fronts or sides. Other portions of the land and railway, and other buildings and erections, are situated in places paved, repaired, cleansed, and lighted under the Act, but have no ground paved or to be paved belonging to or lying before their fronts and sides: and other buildings are situated in places paved, repaired, cleansed, and lighted under the said Act, having ground belonging to them, and lying before the fronts and sides of such buildings, and between such buildings and such places, paved, &c., as aforesaid. Of each of these classes of buildings some are covered in and some are not covered in. Other buildings of the company are entirely finished and ready for occupation, but are empty, untenanted, and unoccupied. The whole land, railway, buildings, and erections form one continuous set of premises used as the railway terminus; but some of the buildings are separate and distinct from one another.

In the said assessment the various rates are placed in different columns: but there has not been kept a distinct rate for lighting and watching, the expenses of watching having been carried into the rate for general purposes.

*602] The whole of the land and railway, and the buildings, whether finished or unfinished, and occupied or unoccupied, are included in the said assessment, and are rated at the same sum in the pound in all the said rates; and no distinction is made between any class; nor, in the watching and lighting rate, is any distinction or difference made with reference to such of the unfinished buildings as are covered in or not covered in.

The parish of Paddington is regulated by a local Act, 5 G. 4, c. cxxvi., (a) a copy of which accompanied this case and was to be taken as part thereof, as also was the Metropolis Local Management Act. By the 112th and 115th sections of the first-mentioned Act the vestry are empowered to make certain rates; and by the 114th section it is enacted

(a) Local and personal, public: "For better governing and regulating the parish of Paddington in the county of Middlesex; for paving, lighting, and watching such parts of the said parish as may be necessary, and for other purposes relating to those objects; and for altering and amending several Acts passed in the 28th, 33d, and 50th years of the reign of His late Majesty King George the Third, for rebuilding the church and enlarging the churchyard of the said parish."

“that the rates and assessments so to be made under the authority of this Act shall be distinguished according to the objects and purposes thereof, and separate and distinct accounts kept thereof; provided nevertheless, that separate and distinct rates and assessments may be made for the repairs of the highways within the said parish, or for any purposes relating to such highways, and for paving and keeping in repair the pavements of the paved streets, squares, and ways within the said parish, or one entire rate may be made to include all the said objects, as the said vestrymen in their discretion shall think best; provided also, that the rates for watching and lighting the roads, streets, ways, and *places within the said parish shall always be kept [*603 distinct from any other rate or rates.”

By the 118th section it is enacted “that all and every such rates and assessments as are hereinbefore directed to be made (except any such rate or rates for watching and lighting) shall be made to comprise and charge all chapels, meeting-houses, markets, warehouses, and all other public buildings whatsoever, charged or not charged to the land tax, and all houses, shops, warehouses, coach-houses, stables, cellars, vaults, buildings, workshops, manufactories, gardens, grounds, wharfs, landing-places, lands, tenements, and hereditaments whatsoever, and also all parts and portions of any houses, buildings, lands, tenements, or hereditaments being separate tenements, situated, lying, and being within the said parish; and such rate or rates for watching and lighting shall comprise and charge all chapels, meeting-houses, markets, warehouses, and all other public buildings whatsoever, charged or not charged to the land tax, and all houses, shops, warehouses, coach-houses, stables, cellars, vaults, buildings, workshops, manufactories, gardens, grounds, wharfs, landing-places, tenements, and hereditaments whatsoever, and all parts and portions of any houses or buildings being separate tenements, but shall not comprise or include any arable or pasture land; and all moneys arising by such rates or assessments as aforesaid shall be and are hereby vested in the said vestry; and such moneys, together with all arrears due upon any former rates or assessments within the said parish, shall be applied and disposed of, first in payment of all the costs, charges, and expenses of collecting, levying, recovering, and managing the said rates, assessments, and moneys respectively (each separate rate bearing its own expenses), and secondly, as to such of the said *rates as [*604 shall be in the nature of poor's-rates, church-rates, composition for statute duty, or rates in lieu thereof, the same shall be applied for such purposes and in such manner as poor-rates, church-rates, and compositions for statute duty are and shall be respectively applicable by this Act or by any other law or laws now in force or hereafter to be enacted, and as to such other rates or assessments as aforesaid, for such purposes as the same shall be intended and imposed to answer, or to which the same are hereby made applicable: provided always, that in case any person or persons shall think himself, herself, or themselves aggrieved by any such rate or assessment so to be made as aforesaid, he, she, or they shall appeal therefrom in the manner hereinafter directed: provided also, that every rate which shall be so made or assessed for the purposes originally provided for by the said Acts of the twenty-eighth, thirty-third, and fiftieth years of the reign of King George the Third, or any of them, shall, in the first place, be applicable (after payment of the

necessary expenses of collection and management) to or for the payment of such principal moneys and interest and annuities as have been heretofore borrowed and secured and granted under the authority of the said three former Acts or any of them (according to the tenor and effect of the securities which have been given to the persons of whom such moneys were borrowed, and to whom such annuities were granted), in such course and order as such persons respectively were heretofore entitled to have the rates and assessments under the said former Acts applied."

By the 123d section it is enacted "that where any of the houses, shops, warehouses, coach-houses, stables, cellars, vaults, buildings, tenements, or hereditaments, shall at the time of making any of the said rates or *assessments be empty and untenanted or unoccupied, *605] then and in every such case it shall and may be lawful for the said vestry to rate and assess such premises respectively at one-half of such rates or assessments, save and except any rate or rates for the relief and maintenance of the poor, and any rate or rates in the nature of church-rates, during the time only that such premises shall be empty, untenanted, or unoccupied; and also in case any such premises, after the making of such rate or rates, assessment or assessments, shall become empty, untenanted, or unoccupied, one-half only of such rates and assessments, except as before excepted, shall be charged on such premises respectively, for and during so long a time as the same shall continue empty, untenanted, and unoccupied; and then and in any of the said cases the said rate or rates, assessment or assessments, and all arrears due thereon, shall be paid by the owner or owners, proprietor or proprietors, lessee or lessees, or by the first or any other tenant or occupier thereof; and in which last case such tenant or tenants, occupier or occupiers, shall and may and is and are hereby authorized to deduct and retain the same out of his, her, or their rent or rents respectively; and the landlord or landlords, owner or owners, of such premises, is and are hereby required to allow such deduction and payment, upon receipt of the residue of his, her, or their respective rents; and the said tenant or tenants, occupier or occupiers, shall be and is and are hereby acquitted and discharged of and from so much of his, her, or their rent, as the rate or rates, assessment or assessments, and all arrears due thereon, and so paid by him, her, or them, shall amount to."

*606] By the 132d section it is enacted that "whereas it *has happened and may happen that houses and other buildings within the said parish have been or may be began to be built, but not finished nor let, and it is reasonable that such houses and buildings should be rated and assessed for the purpose of paving, watching, and lighting; be it therefore further enacted, that until such houses or other buildings which now are or hereafter may be built or in building, shall be finished and tenanted (if the street, square, lane, or other place wherein such house or other building is or shall be situated shall be paved, repaired, cleansed, and lighted by virtue of this Act), it shall and may be lawful to and for the said vestry to rate and assess all such houses and all other buildings situate within the said parish as are or shall be erected and covered in, but not finished nor let, either by one or more distinct assessment or assessments, or by including them in any other assessment or assessments, at a rate not exceeding sixpence for

every square yard of ground paved or to be paved belonging to or lying before the fronts or sides of such houses or other buildings, and in like manner and for the like purposes to rate and assess all such houses or other buildings as last mentioned which are or shall be erected but not covered in, at a rate not exceeding four pence for every square yard of ground paved or to be paved by virtue of this Act, and belonging to or lying before the fronts or sides of such houses or other buildings, until the same shall be covered in as aforesaid, and then at a rate not exceeding four pence for every square yard, until the same shall be let or occupied; which last-mentioned rates or assessments shall be paid by and recoverable from the proprietor or proprietors, lessee or lessees, owner or owners, of such *house or houses, building or buildings respectively, and shall be charged and chargeable on the said premises; and if the said owner or owners, proprietor or proprietors, lessee or lessees, shall refuse or neglect to pay the same upon demand, then and in every such case such rate or rates, assessment or assessments, and all arrears due thereon, shall and may be levied on the goods and chattels of the person or persons so required to pay the same in manner herein directed; and in case the owner or owners, proprietor or proprietors, lessee or lessees of such house or houses, building or buildings, shall not be known or cannot be found, then the said rate or rates, assessment or assessments made thereon shall be and remain charged and chargeable on the said premises until the owner or owners, proprietor or proprietors, lessee or lessees, can be found, and the same may at any time be levied and recovered upon the said premises in like manner as other rates made by virtue of this Act are made recoverable.” [*607]

By the 92d section of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), it is enacted that “all expenses of paving, lighting, watering, cleansing, or improving any parish or any part of any parish mentioned in either of the Schedules (A.) and (B.) to this Act, and all other expenses in relation to the regulation, government, or public concerns of any such parish or part, or of the inhabitants thereof, except only expenses incurred in relation to the affairs of the church, or for the management or relief of the poor, and other expenses by law payable out of any poor-rate, which are not herein provided for, shall be deemed expenses incurred in the execution of this Act, and shall be defrayed accordingly.”

By the 96th section it is enacted that “every vestry *and district board shall, within their parish or district (exclusively of any other persons whatsoever), execute the office of and be surveyor of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities, as any surveyor of highways in England is now or may hereafter be invested with or liable to by virtue of his office, under the laws for the time being in force, so far as such powers, authorities, duties, and liabilities are not inconsistent with this Act; but all expenses which under any such law ought to be defrayed by highway-rates shall be defrayed by means of the rates to be raised under this Act, and all moneys which would be applicable in aid of such highway-rates shall be applied in aid of the said rates to be raised under this Act.” [*608]

By the 158th section it is enacted that “every vestry and district board shall from time to time, by order under their seal, require the

overseers of their parish, or for the several parishes in their district, to levy, and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act (and such orders may be made wholly or in part in respect of expenses already incurred or of expenses to be hereafter incurred); and every such vestry and board shall distinguish in their orders sums required for defraying expenses of constructing, altering, maintaining, and cleansing the sewers, or otherwise connected with sewerage, and also, where the Act of the session holden in the third and fourth years of King William the Fourth, chapter ninety, or any other Act by virtue whereof land is rated in *609] respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish, or any part of any parish, at the time of the passing of this Act, distinguish, as regards such parish, or part, the sums required for defraying expenses of lighting their parish or district, from sums required for defraying other expenses of executing this Act."

By the 159th section it is enacted that, "where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied as aforesaid, have or has been incurred for the special benefit of any particular part of their parish or district, or otherwise have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may, by any such order, direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require; and any such board may refrain, where any entire parish ought in their judgment to be so exempt, from issuing an order for levying any money thereon notwithstanding they may issue an order or orders for levying sums upon any other parish or parishes in their district."

By the 161st section it is enacted that "the overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, *610] or the part thereof upon which any sum *specified in such order is required to be levied, in respect of each sum thereby ordered to be levied; that is to say, a separate rate in respect of each sum ordered to be levied for defraying expenses connected with sewerage, to be called a Sewers-Rate; a separate rate in respect of each sum ordered to be levied for defraying expenses of lighting (where a separate sum is ordered to be levied for defraying such expenses), to be called a Lighting-Rate; and a separate rate in respect of each sum ordered to be levied for defraying other expenses of executing this Act, to be called a General Rate; and shall make such respective rates of such amount in the pound on the annual value of the property rateable, as will, in their judgment, having regard to all circumstances, be sufficient to raise the sums specified in such order; and such rates shall be levied on the persons and in respect of the property by law rateable to the relief of the

poor in the respective parishes, and shall be assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor; and the said overseers shall, for the purpose of levying such rates, proceed in the same manner, and have the same powers, remedies, and privileges, as for levying money for the relief of the poor; and all such rates shall be allowed in the same manner, and be subject to all the same provisions, in relation to appeal, and to excusing persons from payment on account of poverty and otherwise, as the rate for the relief of the poor in the same parish."

By the 247th section it is enacted that "all Acts of Parliament in force in any parish or place to which this Act extends, or in any part of such parish or place, shall, so far as the same are inconsistent with the *provisions of this Act, be repealed as regards such parish [*611 or place, or such part thereof, notwithstanding any provisions of this Act continuing and transferring respectively to vestries of parishes, and transferring to district boards any duties, powers, or authorities now vested in vestries, commissioners, or other bodies."

The Great Western Railway Company contend that in the said assessment the rates for watching and lighting the roads, streets, ways, and places within the said parish should have been kept distinct from the other rates. They also contend that there should be a separate assessment on different parts of their property, and that the unfinished buildings should be separately assessed from the finished buildings.

They further contend that they are not assessable to the paving, lighting, and watching upon the land and railway, or such unfinished buildings as are situated in places paved and repaired, cleansed and lighted under the said local Act, but have no ground paved or to be paved belonging or lying before their fronts or sides; and that, with reference to the unfinished buildings which are situated in places paved and repaired, cleansed and lighted under the said Act, but have ground paved or to be paved belonging to and lying before their fronts or sides, they are only liable according as they are covered in or not covered in to the extent mentioned, and according to the provisions of the 132d section of the said local Act.

They further contend that, under the provisions of the Metropolis Local Management Act, parts of their property are wholly or partially exempt from sewers-rates, watching and lighting, and general rates. The parish contend that the mode of rating is now governed *by [*612 the Metropolis Local Management Act, 1855, and that under the 161st section of that Act it is sufficient if the sewers-rate and the lighting-rate be kept distinct from other rates: and, further, that, under that Act, the company are assessable to the paving, lighting, and watching rate upon their land, railway, and unfinished buildings situated in places paved, repaired, cleansed, and lighted under the said local Act, whether they have or have not ground paved or to be paved belonging or lying before their fronts or sides; and that the provisions of the 132d section of the local Act as to buildings covered in and not covered in are no longer in force.

The parish further contend that, under the 118th and 123d sections of the local Act, and the 161st section of the Metropolis Local Management Act, 1855, unoccupied houses are assessable to the full amount

of the rates which are imposed under the authority of the last-mentioned Act.

If the Court should be of opinion that any one or more of the rates, except the lighting and sewers rates, should be kept distinct from the other rates, and that the property of the company, or any part or parts thereof, should be separately assessed, as contended for by the company, or that the same or any part or parts thereof should be exempt wholly or partially from any of the rates, the assessment is to be amended accordingly; and the rating upon the unfinished buildings and upon the buildings not covered in, and upon finished but unoccupied buildings, in respect of the paving, lighting, and watching rate, or either of them, is to be altered according to the decision of the Court.

*613] The case was now argued, (a) by *Dowdeswell*, for *the respondents, and *Huddleston*, for the appellants. It was agreed, upon the argument, that the respondents should admit the first objection of the appellants, and that the lighting and sewers rates should be assessed separately from the other rates. The nature of the argument upon the other points appears sufficiently from the judgment. (a)

Cur. adv. vult.

ERLE, J., in the Vacation following this Term (July 3d, 1858), delivered the judgment of the Court.

Three questions are stated at the end of the case.

The first is, whether any rates except the lighting and the sewers rate should be kept distinct from the other rate.

This, we think, is answered by the Metropolis Act, 1855, sect. 161 enacting that a separate rate shall be made for sewerage, and a separate rate for lighting where so ordered, and a separate rate in respect of each sum ordered to be raised for defraying other expenses of executing the Act, to be called a general rate; and that such respective rates should be made in the manner pointed out in the section. We consider that the three rates here mentioned are the only rates which the vestry are authorized to make under this Act, and that therefore the appellants cannot sustain their claim that separate rates should be made in respect of other matters.

The second and third questions are, whether any part of the property of the company should be separately assessed, and whether any part *614] should be exempt either *partially or wholly: and to these our answer is in the negative, subject to the arrangement in respect of the lighting-rate which was agreed on by the counsel at the time of the argument.

The same 161st section enacts that the said rates should be levied on the persons and in respect of the property by law rateable to the relief of the poor in the respective parishes, and should be subject to the same incidents as the rates for the relief of the poor in the same parishes. This enactment directs the vestry to guide itself by the rate for the relief of the poor in each parish; and no property should be separately

(a) Before Lord Campbell, C. J., Wightman and Erle, Js.

(b) In the course of the argument, *Howell v. London Dock Company*, 8 E. & B. 212 (R. C. L. R. vol. 92), was cited. ERLE, J.—We regret that we answered the questions submitted to us in that case, as it is so often quoted as a decision. It was an anomalous case; and we gave our opinion, at the request of the parties, rather than deny our jurisdiction: but we gave it merely as between those parties, and said expressly, at the time, that we did not mean to lay down the general law.

assessed or exempt unless it is so dealt with in the poor-rate for that parish. Stat. 5 G. 4, c. cxxvi. s. 118, regulates the rateability to the poor in Paddington, and makes all hereditaments whatsoever rateable to the poor in one rate, without any exemption.

These sections contain the direct answer to the questions now to be answered: and it is unnecessary to point out in our judgment, as was done in the argument, that the powers of the local commissioners are transferred to the vestry, and that the power of making separate rates for separate purposes, as for watching, paving, and the like, with varying exemptions for various kinds of property, as for finished and unfinished buildings, occupied and unoccupied houses, and the like, according to the different sections of stat. 5 G. 4, c. cxxvi., applicable thereto, has ceased, being superseded by the duties and powers cast on the vestry by the Metropolis Local Management Act, 1855.

Subject, therefore, to the exception in respect of lighting above mentioned, our judgment is for the respondents.

Judgment for the respondents.

***ADAMS, Appellant, v. LAKEMAN, Respondent. June 5. [*615**

Under The Highway Act, 5 & 6 W. 4, c. 50, an assistant surveyor to a highway board, appointed in pursuance of sect. 18, is not liable to a penalty, under sect. 44, for not making out his accounts and laying them before the justices at the special highway sessions; sect. 44 applying only to an ordinary surveyor of highways, where no board and assistant surveyor to the board has been appointed.

ON appeal, before the justices of the petty sessional division of Paignton, in the county of Devon, against the conviction hereinafter mentioned, a case was stated by the justices for the opinion of this Court, of which the material facts are as follows.

The defendant Robert Adams, the appellant, appeared before the justices on the complaint of Thomas Lakeman, the respondent, for that he, the appellant, had neglected to lay before the justices, at a petty sessions for the highways, as by law required, the books of account of all moneys received and expended by him for and on account of the highways of the parish of Brixham, for the year ending 25th March, 1858.

The appellant had been employed as assistant surveyor to the board for the repair of highways, in the parish of Brixham, for the year preceding, and had failed to produce his accounts at the special highway sessions held at Paignton, although the usual precepts, addressed to the surveyors of highways in the parish, requiring them to do so, had been served personally upon him as such assistant surveyor.

It was contended, on behalf of the appellant, that, as the board for the repair of the highways, appointed by the vestry under sect. 18 of the Highway Act, 5 & 6 W. 4, c. 50, (a) *was not named in sect. 44 of that Act, such board were not bound to lay their accounts [*616

(a) Sects. 6, 7, empower the inhabitants of every parish maintaining its own highways, to meet in vestry and elect, each year, one or more persons to act as surveyor of highways; or, by sect. 9, they may elect a salaried surveyor, who is to be subject to the same duties and penalties as these appointable under sects. 6, 7.

- *617] before the justices under *that section, but were bound only to account to the vestry; and, under stat. 12 & 13 Vict. c. 35, s.
 *618] 1, *to send a statement to the Secretary of State: that these steps had been taken by the board: that the *assistant surveyor,
 *619] acting under such board, could not be intended by the words

Sect. 18 provides that, in any parish where the population by the then last census exceeds 5000, "if it shall be determined by a majority of two-thirds of the votes of the vestrymen present at such meeting as aforesaid, to form a board for the superintendence of the highways of the said parish, and for the purpose of carrying the provisions of this Act into effect, it shall be lawful for the said vestry to nominate and elect any number of persons, not exceeding twenty nor less than five, being respectively householders and residing in and assessed to the rate for the relief of the poor of the said parish, and also liable to be rated to the repair of the highways in the said parish under and by virtue of this Act, to serve the office of surveyors of the highways for the year ensuing; and such persons so to be nominated and elected as such surveyors, or any three of them, shall be and are authorized to act as a board, and to be called 'the board for repair of the highways in the parish of ' (as the case may be), and to carry into effect the powers, authorities, and directions in this Act contained;" and such board is authorized "to appoint a collector, or any number of collectors, of the rates to be made under the authority of this Act, and also to employ a person of skill and experience to act as an assistant surveyor to the said board, and also a clerk to attend the said board, and to keep the accounts and minutes of the proceedings thereof; such assistant surveyor and clerk to be paid such reasonable salaries out of the said rates as the said board shall determine; and upon such board being so nominated and elected as aforesaid all and every the powers and authorities given and created by this Act, and granted to or vested in the vestry, and in any person or persons as surveyor, shall, for the purpose of the parish so nominating and electing such board, be and the same are declared to be vested in the said persons so to be elected, or any three of them acting as such board as aforesaid; and such persons, or any three of them, at a meeting to be convened for that purpose, may and they are hereby authorized to nominate and appoint a fit and proper person to be treasurer for the deposit of the moneys to be collected for the purposes of this Act," and to take security from him; "and all moneys to be drawn from such treasurer for the purposes of this Act shall be drawn by drafts or checks to be signed by the said persons so to be nominated and elected as aforesaid, or any three of them, at some one of their meetings to be held under this Act, and such drafts shall be respectively signed and entered in their books by the said clerk to be appointed as aforesaid: provided always, and it is hereby declared, that upon the expiration of the year for which such board shall be elected as aforesaid, and before or on the day for the nomination and election of persons as surveyors under the authority of this Act, the said board shall and are hereby directed to present to the vestry of the parish for which they shall have acted copies of all their accounts, and also of the minutes of their proceedings during the preceding year."

Sect. 20 enacts, that "if any surveyor or district surveyor or assistant surveyor shall neglect his duty in anything required of him by this Act, for which no particular penalty is imposed, he shall forfeit for every such offence any sum not exceeding 5l."

Sect. 39 provides "that the surveyor in every parish shall keep separate and distinct accounts of the moneys levied for the highway-rate; and such accounts shall specify the different sums, and the times when and the persons to whom and by whom the same shall have been collected and paid."

Sect. 40 provides "that the said surveyor, district surveyor, or assistant surveyor, as the case may be, shall and he is hereby required from time to time to keep a book, in which shall be entered a just and true and particular account of all money which shall have come to his hands as surveyor, district surveyor, or assistant surveyor of the parish for the purposes of this Act, and to whom, and on what occasion, and for what work, and in what place, and on what day he shall have paid or applied the same, and also an account of all tools, materials, implements, and other things provided by him for the repair of the said highways; and such book shall at all reasonable times be open to the inspection of every inhabitant rated to the highway-rate of the parish, or of any of the parishes united into a district, without fee or reward, and every such inhabitant may take copies or extracts from the said book, or any part thereof, without paying for the same; and in case the said surveyor, district surveyor, or assistant surveyor shall neglect to provide such book, or to enter therein every sum received or paid by him within one week after the same shall have been received or paid, or shall refuse to permit or shall not permit any such inhabitant as aforesaid at any reasonable time to inspect the same or take copies or extracts as aforesaid, such surveyor, district surveyor, or assistant surveyor shall forfeit and pay any sum not exceeding 5l. for each default."

Sect. 41 provides "that all the said books, papers, writings, and accounts, and all materials,

"assistant surveyor" in sect. 44: and that, consequently, he was not liable to a penalty, under that section, for not laying his accounts before the justices.

The justices held that the words "assistant surveyor," in sect. 44, must be taken to include the assistant surveyor to the board for the repairs of the highways; that the appellant was therefore bound, by that section, to lay his accounts before the justices; and that, failing to do so, he had neglected his duty within the meaning of sect. 20, and was liable, under that section, to a penalty not exceeding 5*l.*: and they convicted him in the nominal penalty of 6*d.*

Couch, for the respondent.—The conviction was right. Sect. 18 of stat. 5 & 6 W. 4, c. 50, gives to the vestry power to appoint a board, and to the board power to appoint an assistant surveyor. Sect. 20 imposes a penalty on "any surveyor or district surveyor or assistant surveyor" who shall neglect his duties. By sect. 44 the accounts for each year, signed by "the surveyor, district surveyor, or assistant surveyor," are to be laid before the justices within a specified time. The subject-matter of those accounts is laid down by sects. 40, 42: and it clearly embraces a class of items distinct from those comprised in the accounts to be kept by the assistant surveyor to the board under sect. 18. His duties, under sect. 18, are rather those of a secretary, his business being to register the proceedings of the board, and to keep

tools, and implements which shall be provided in pursuance of this Act for repairing or preserving the highways, and also the scrapings of the said highways, shall be vested in the surveyor for the time being; or in case a district surveyor shall be appointed, then all such books, papers, writings, and accounts, and all materials, tools, implements, and scrapings, shall be invested in the district surveyor."

Sect. 42 provides "that the said surveyor, district surveyor, or assistant surveyor shall, within fourteen days after leaving his office, deliver such books and accounts verified as herein directed, together with all such sums of money as shall be due from him, and likewise all tools, materials, implements, and other things as aforesaid, to his successor in office, or retain the same in his hands and account for them in his next account if he shall be continued surveyor or district surveyor of such parish in the succeeding year; and in case such surveyor or district surveyor shall neglect to deliver within such time as aforesaid the said books, papers, writings, and accounts, and such tools, materials, implements, and other things, in manner aforesaid, he shall for every such offence forfeit any sum not exceeding 5*l.*"

Sect. 44 provides "that within fourteen days after the election or appointment of surveyor as herein directed, the accounts as aforesaid made in writing, and signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, of all moneys received and disbursed by virtue of this Act, ending on the day of election or appointment of surveyor, shall be made up, balanced, and laid before the parishioners in vestry assembled, who may, if they think fit, order an abstract thereof to be printed and published; and within one calendar month after the election or appointment of surveyor as herein directed, the said accounts shall be signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, and laid before the justices of the peace at a special sessions for the highways, holden at the place nearest to the parish or district for which such surveyor shall have been appointed, and such justices are hereby authorized and required to examine him as to the truth of the said accounts or of any charge contained therein: provided always, that if any person chargeable to the rate authorized to be made by this Act has any complaint against such accounts or the application of the moneys received by the said surveyor, it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification of such accounts as aforesaid, and the said justices are hereby required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet: provided nevertheless, that the several surveyors appointed under the authority of" stat. 13 G. 3, c. 78, "shall produce such books and statement and pass their accounts before the justices at a special sessions for the highways to be holden within their respective divisions in the week next after that in which the" 25th of March, 1836, shall be, "and pay the balances thereof to the surveyor to be chosen in pursuance of this Act, in the same manner as they would have done to the surveyors to have been appointed if this Act had not been passed."

their accounts. These accounts are of a much more general character than those under sects. 40, 42, and would relate principally to the moneys received in respect of rates and expended by the board. The *620] assistant surveyor, therefore, is not exempt, by *reason of sect. 18, from the obligation imposed upon him, by sect. 44, of laying the accounts kept by him, under sects. 42, 44, before the justices. The justices are an independent tribunal, before which any individual rate-payer may, by the Act, state his objections to any particular item of the assistant surveyor's accounts. The arrangement in sect. 18, as to laying the accounts before the vestry, is merely an arrangement between the vestry and the board appointed by them, and does not afford the same means of objection by the rate-payers.

Montague Smith, for the appellant.—The highway board appointed, under sect. 18, by the vestry are the representatives of the whole parish, as regards the superintendence of highways: they exercise the functions of surveyors, and, with the assistance of their treasurer and clerk, manage the important part of the highway accounts. The duties of this assistant surveyor do not embrace the keeping of the highway accounts at all, in the ordinary sense of the word; and therefore he is not within the provisions of sect. 44. (He was then stopped by the Court.)

Lord CAMPBELL, C. J.—Looking at the functions of the assistant surveyor to the board, under sect. 18, I do not see that they include those of an accountant; and therefore the provisions of sect. 44 do not apply to such assistant surveyor. The conviction is, consequently, bad. (COLERIDGE, J., was absent.)

*621] ERLE, J.—I also am of opinion that the assistant *surveyor appointed by the highway board, under sect. 18, is not within the provisions of sect. 44. The latter section seems to apply only to the ordinary surveyor of highways for the parish, where no board exists. This construction of the section is strongly confirmed by the fact that it requires the accounts to be laid before the vestry within fourteen days after the appointment of the surveyor for the ensuing year; while, by sect. 18, the powers and authorities of surveyor are to be transferred to the board. The words “assistant surveyor” seem to have been inadvertently introduced into several sections. By sect. 39, which is the first that relates to the keeping of the accounts, the surveyor is to perform that duty. By sect. 40, the surveyor or assistant surveyor is to keep books: but there “assistant surveyor” seems to have been added by mistake; for, by sect. 41, the books, &c., are to be vested in the surveyor or district surveyor, the assistant surveyor not being mentioned. The same confusion exists in sect. 42, by which the “surveyor, district surveyor, or assistant surveyor” is to deliver up the books on leaving office, but the penalty for not doing so is to be inflicted only on “such surveyor or district surveyor.” And again, in sect. 44, the assistant surveyor is introduced, but for the purpose of performing what, by the previous sections of the Act, he could not do, viz., keep and render accounts. I think, therefore, that the appellant has, in this case, been convicted by the justices for not exercising functions which he had no power to exercise.

(CROMPTON, J., was absent.)

Appeal allowed.

***IGNATIUS BONOMI, and CAROLINE his Wife, v. BACKHOUSE. June 7. [*622**

Declaration alleged that plaintiff was owner of the reversion of a messuage entitled to the support of the underground mines and earth of the contiguous ground, and that defendant, well knowing, &c., negligently, and without leaving proper support, worked the mines under the contiguous land, and kept and continued the messuage, and caused it to remain, without proper support; whereby it became injured. Plea: That the cause of action did not accrue within six years.

It appeared that the messuage was an ancient house: and that defendant, more than six years before action brought, worked the mines at 280 yards distance from the house, in such a manner that the earth intervening between the place of working and the foundation of the house, gradually gave way, and finally, within six years of action brought, the effect reached the foundation of the house, which was thereby injured. Till within the six years, no actual damage to the house occurred, nor was the act of defendant known to plaintiff.

Held, By the Court of Q. B. (Lord Campbell, C. J., Coleridge and Erle, Js., dissentiente Wightman, J.), that the defendant was entitled to the verdict.

Judgment reversed in Exchequer Chamber.

THE writ in this action issued on 20th May, 1856. The declaration complained: For that certain messuages and buildings, situated in the parish of West Auckland in the county of Durham, were in the occupation of a certain person, to wit, William Parkin, to wit, as tenant thereof, the reversion of and in the said premises then and still being in and belonging to the plaintiffs in right of the said Caroline; and for that the plaintiffs, in right of the said Caroline, were entitled to have the said messuages and buildings supported, to wit, by the mines, earth, and soil underground, contiguous, and near to, and under, the said messuages and buildings: yet defendant, well knowing the premises, wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient support in that behalf, worked certain coal-mines under ground, contiguous and near to, and under the said messuages and buildings, and dug for, and got, and took away, coals, earth, and soil, out of the mines, and wrongfully and unjustly kept and continued the said messuages and buildings, and *caused them to be and remain, without [*623 any proper or reasonable or sufficient support, for a long space of time: whereby, and by reason of the premises, the foundations of the said messuages and buildings became and were greatly weakened and injured; and the walls of the said messuages and buildings became and were cracked and injured: and the ground, on which the said messuages and buildings stood, subsided, cracked, swagged, and gave way. That, by means of the premises, plaintiffs have been and are injured in their reversionary estate and interest in the said messuages and buildings.

Pleas. 1. Not guilty.

2. Denial of Parkin's occupancy as tenant as alleged.

3. Denial of the reversion being in the plaintiffs as alleged.

4. That the plaintiffs were not entitled to have the said messuages and buildings, or any or either of them, supported, to wit, by the mines, earth, and soil under ground, contiguous, near to, and under the said messuages and buildings, as alleged.

5. That the said alleged causes of action did not accrue within six years before this suit.

Issues on all the pleas.

On the trial, at the Durham Summer Assizes, 1856, it was ordered, by consent of parties, that the verdict should be entered for the plain-

tiffs, subject to a special case to be stated for the opinion of this Court by a barrister, who was to find what caused the damage of which plaintiffs complained, and state such facts as were material, with dates. The arbitrator accordingly stated a case, in substance as follows.

The messuages and buildings in the declaration mentioned are situated *624] on the north side of the village of *West Auckland in the county of Durham. And they consist of a dwelling-house and outbuildings contiguous to each other, which are now, and have for some time past been, used as an inn called the Crown Inn, and a yard immediately behind the dwelling-house and buildings. The dwelling-house and other buildings are all ancient. And they had been in existence for more than forty years before they sustained the injuries complained of in the declaration. And immediately before sustaining those injuries they were in good repair. The said messuages and buildings in the declaration mentioned, the land on which they stand, and the yard behind, were, on 23d September, 1835, conveyed to the female plaintiff Caroline Ann Bonomi, who was then unmarried, and by her then name Caroline Ann Fielding, in fee simple. And she continued to be seised as of fee of the said messuages, buildings, yard, and land, until the time of her marriage with the plaintiff Ignatius Bonomi; which took place on the 27th day of December, 1837. When, and from which time, the plaintiffs became and were, and have ever since continued to be, seised of the said messuages, buildings, yard, and land, as of fee, in right of the said Caroline, the female plaintiff. In the year 1848 the said messuages and buildings and yard were let by the plaintiffs to William Parkin, who has continued ever since that time to occupy the same, as tenant thereof to the plaintiffs. And the plaintiffs, in right of the said Caroline, during all that time, continued to be, and still are, seised, as of fee, of and in the reversion of and in the said messuages, buildings, yard, and land.

The messuages and buildings in the declaration mentioned, and the *625] land upon which they stand, were, at *all times before those messuages and buildings sustained the injuries complained of in the declaration, firmly supported by the mines, earth, and soil underground, and as well those under the lands contiguous and near to, as the land under, the said messuages, buildings, and land of the plaintiffs. (The ground plot of the plaintiffs' said messuages and buildings was shown in a plan, to be taken as part of the case.)

The defendant, together with some other persons, was, for several years before and until June, 1853, lessee of West Auckland Colliery (mentioned in the order of reference), consisting, amongst others, of coal-mines lying under all the lands surrounding and immediately adjoining the plaintiffs' said dwelling-house, buildings, and land. (The workings of the colliery were shown in the plan.) The defendant and his co-lessees held a large part of those mines under a lease for years granted by the late Bishop of Durham, to whom that part of the mines belonged in right of his see; and other part of the mines under a lease for years granted by Sir William Eden, to whom that part of the mines belonged. The residue of the mines worked by the defendant and his co-lessees were chiefly under small parcels of land. And they worked those parts of the mines generally by special agreements made with the owners of coal from time to time. But, in at least one case, they worked the coal without the consent of the owner of it. The defendant and his

co-lessees worked the coal-mines under the plaintiffs' said dwelling-house, buildings, and land, and also under all the lands surrounding and adjoining to the plaintiffs' dwelling-house, buildings, and land, and had nearly finished their workings under all those lands on the 20th day of May, 1850. But the *residue, being only a small portion of the [*626 workings of the mines in that district, and near to the said village of West Auckland, was executed and completed after that time, and within the term of six years next before the commencement of this action. I have not had any evidence given before me that the plaintiffs in any way assented to the coal under their said dwelling-house, buildings, and land being worked by the defendant and his co-lessees.

The coal under the plaintiffs' said house, buildings, and land, and under the lands surrounding and adjoining the house, buildings, and land of the plaintiffs, was of a quality called "cleety," being liable upon exposure to the air gradually to become disintegrated and fall to pieces. The defendant and his co-lessees worked the coal-mines under, contiguous and near to the plaintiffs' house, buildings, and land, in the usual manner, taking away a portion of the coal, and leaving the residue standing as pillars to support the roof of the mines. The pillars of coal thus left standing unworked by the defendant and his co-lessees in many places would have been amply sufficient to support the roof, and bear the ordinary superincumbent weight and pressure upon them, if all the other parts of the defendant's mines had been worked in the same manner. In several other places the pillars of coal, which the defendant and his co-lessees had left standing and unworked, were of smaller dimensions than those above mentioned. These smaller pillars would have been sufficient to support the roof and sustain all the superincumbent weight for many years to come, if the roof of the defendant's mines in all other parts had been properly supported. But, owing to the peculiar properties of the coal already mentioned, these *last- [*627 mentioned pillars would not have permanently supported the parts of the roof which were above them; and they would ultimately have given way and let down those parts of the roof which were supported by the weak pillars. But it is impossible to determine whether such partial falls in the roof would or would not have caused any injury to the plaintiffs' house and buildings.

In working those parts of the mines where pillars of coal were left standing unworked for the purpose of supporting the roofs as above mentioned, the defendant and his co-lessees were not guilty of any negligence or improper working, except in leaving a portion of the pillars too small, having regard to the nature of the coal as above mentioned.

Before the year 1842, the then lessees of the colliery had, in working the mines under lands to the northward of the plaintiffs' house and buildings, and commencing at a point about 165 yards from that house and buildings, first worked a portion of the coal, leaving pillars in the usual manner; and afterwards, and before the year just mentioned, worked away the whole of the pillars, which is a mode of working amongst miners called "working the brocken." The effect of the removal of those pillars was to let down the whole of the roof in that district of the mine, and produce what is called a "goaf." The place in which the mines were thus worked is called "The North Goaf."

The defendant and his co-lessees, in the years 1846 and 1847, worked

a part of their mines under land called "The Batts," to the north-east of the plaintiffs' house and buildings. And, after working the coal in the usual manner, they during those two years worked and removed the *628] pillars of coal which had been *previously left unworked; and in consequence the roof of that part of the mine fell down. Those parts of the workings in which the pillars were so worked away by the defendant and his co-lessees are called, respectively, "Batts Goaf" and "South Batts Goaf." Batts Goaf is about 254 yards, and South Batts Goaf about 386 yards, from the plaintiffs' property.

None of the workings which have already been mentioned could alone have caused, or did in fact cause, any part of the damage complained of by the plaintiffs in this action. But the working of those three goaves did nevertheless render the plaintiffs' house, buildings, and land, more liable to be injured by the thrust which was produced by the defendant and his co-lessees working "Simpson's Goaf," as hereinafter mentioned. But neither of the three goaves firstly above mentioned produced any thrust such as hereinafter mentioned.

In the year 1848, the defendant and his co-lessees purchased the coal-mines under about $4\frac{1}{2}$ acres of land belonging to Daniel Simpson: they worked the coal during that and the following year. After working this coal in the usual manner, the defendant and his co-lessees, in the year 1849, worked and removed the pillars of coal which they had previously left unworked under about two acres of Daniel Simpson's land, and thus formed what is called "Simpson's Goaf," which is about 280 yards from the plaintiffs' property. The removal of the pillars of coal in Simpson's Goaf was completed before the latter end of the year 1849: since which time there has not been any working in Simpson's Goaf. After the year 1849 the roof of that part of the mine commenced to fall. And, during the year 1850, the roof and the strata of stone, earth, and *629] other material *above that part of the mine fell down and subsided to such an extent, and in such a manner as to produce what is amongst miners called "a thrust," and ultimately also the injurious consequences resulting from a thrust. The thrust, thus produced by this working of the coal under Simpson's land, or, in other words, by the working of Simpson's Goaf, was similar to other thrusts in its effects upon surrounding lands in its vicinity: and consequently those effects slowly and gradually extended to the lands surrounding Simpson's Goaf, under which the coal had been worked, leaving pillars for the support of the roof of the mines under those lands. As the thrust in its progress arrived at any land under which the coal had been worked, the earth and materials above the pillars of coal were dislocated or disturbed to such an extent as to throw down or crush the pillars of coal which had been left to support the roof of the mine: and then the roof of the mine fell; and the superincumbent strata, and also the soil on the surface, subsided gradually, but irregularly. The houses and other buildings upon the lands which were thus disturbed and let down were extensively injured: and houses and buildings in the immediate vicinity of Simpson's Goaf were thus injured during the year 1850. And the defendant and his co-lessees repaired or paid for the repairs of those houses and buildings. The plaintiffs' house was not injured before the year 1854. But, during the course of that year, the thrust and its injurious effects began to operate upon the plaintiffs' land and the sur-

rounding land. And the pillars of coal underneath all those lands were thrown down or crushed: and consequently the surface of the land, the foundations of the plaintiffs' house and buildings, and the various strata of stone and *other materials between the surface and the coal-mine, were disturbed and subsided in such manner as, in the [*630 month of December, 1854, to cause a portion of the damage to the plaintiffs' house and buildings complained of in the declaration. Since the year 1854 the plaintiffs' land has been further disturbed, and has further subsided, in consequence of the continued operation of the thrust above mentioned. And the plaintiffs' house and buildings had in consequence received further damage, between that year and commencement of this action, on the 20th day of May, 1856. Before this disturbance and subsidence first commenced, in December, 1854, the plaintiffs did not know, and had no reason to suspect, that the thrust which was the cause of such disturbance and subsidence was in operation, or in existence; nor had they any knowledge of the way in which the defendant and his co-lessees had worked the mines under Simpson's land so as to create Simpson's Goaf, and produce the thrust above mentioned.

Since the commencement of the action, further subsidence and disturbance of the plaintiffs' land, and the foundations of their house and buildings, have been occasioned by the thrust: and the house and buildings have in consequence been further injured. All the injuries to the plaintiffs' house and buildings above mentioned, and as well those sustained before as since the commencement of the action, are very considerable; and they have much diminished the value of the house and buildings. The thrust produced by the working of Simpson's Goaf by the defendant and his co-lessees, as above mentioned, has been the cause and the sole cause of all the damage complained of in the declaration, and all the other damage above mentioned. After the *com- [*631 mencement of the thrust, the defendant and his co-lessees did not take any steps to arrest the further progress of it, or prevent it from extending to the plaintiffs' property. And the pillars of coal under the lands surrounding the plaintiffs' land were inadequate alone to sustain the pressure thrown upon them by the thrust. If the coal-mines under the lands surrounding the plaintiffs' house and buildings had been left unworked to a sufficient distance from the house and buildings, they would not have sustained any of the damage complained of in the declaration.

The defendant and his co-lessees, after they had worked the mines under the lands surrounding the plaintiffs' house and buildings, might have supported the roof of those parts of the mines in such a manner as to have prevented the damage complained of in the declaration. But the expense of so doing would have been very great, and would in the whole have amounted to a much larger sum than the value of the property injured.

The thrust produced by working Simpson's Goaf, as above mentioned, is still in operation, and will, in all probability, continue in operation for a considerable time to come. And in all probability the house and buildings of the plaintiffs will sustain further injury: and the plaintiffs will sustain further damage by reason of the thrust and its injurious effects upon their house, buildings, and land.

The acts which occasioned the damage and injuries above mentioned were all of them done without the plaintiffs' leave.

And I, the said arbitrator, do find:

*632] That the messuages and buildings in the declaration *mentioned were in the occupation of William Parkin, as tenant thereof, as in the declaration alleged:

That the reversion of and in the said messuages and buildings did belong to the plaintiffs, as in the declaration alleged:

With respect to the issue upon the defendant's fourth plea, so far as that issue involves any question of fact, that the plaintiffs were entitled to have the said messuages and buildings supported by the mines underground contiguous and near to and under the said messuages and buildings, as in the declaration alleged.

The questions for the opinion of the Court are:

1. Whether the facts above stated entitle the plaintiffs to a verdict on the issue joined on the first plea, as to all or any and which of the causes of action mentioned in the declaration: if the plaintiffs be so entitled as to all or any of such causes of action, the verdict is to be entered for them on that issue accordingly; otherwise for the defendant.

2. Whether the facts above stated entitle the plaintiffs, or the defendant, to a verdict on the issue joined on the fourth plea: and the verdict on that issue is to be entered as the Court shall direct.

3. Whether the facts above stated entitle the plaintiffs to a verdict on the issue joined on the fifth plea as to all or any and which of the causes of action in the declaration mentioned: if the plaintiffs be so entitled as to all or any of such causes of action, the verdict is to be entered for them on that issue accordingly; otherwise for the defendant.

The verdict is to be entered for the plaintiffs on each of the other issues.

*633] If the verdict is to be entered for the plaintiffs upon *the issues joined on the first, fourth, and fifth pleas, another question for the opinion of the Court is:

4. Whether the defendant is responsible for all the damage which has been sustained by the plaintiffs by reason of the injuries to their said messuages and buildings above described, or for any and what part of that damage; and whether he is responsible in any and in what respect for the probable future damage which may be occasioned in manner above described, or for the damage occasioned by the diminution in value of the said messuages and buildings by reason of their insecure state and condition, or the injuries which will probably be hereafter occasioned by the further progress of the thrust as above mentioned.

The case was argued in Hilary Term, (a) 1857, by *Knowles* for the plaintiffs and *Hugh Hill* for the defendant. For the course of the argument, it is considered sufficient to refer to the judgments delivered in this Court, and to the argument and judgment in the Court of Exchequer Chamber. (b)

Cur. adv. vult.

(a) November 10th. Another case, *Longstaff v. Backhouse*, raising the same questions, was argued on the same day, by *Manisty* for the plaintiff and *Joseph Addison* for the defendant. There were three other cases also raising the same question: and it was agreed that the judgment in one case should be treated as governing the others; the same party being the defendant in all five.

(b) Reference was made in the arguments in this Court to the following authorities, not mentioned in the judgments: *Ashby v. White*, 2 Ld. Raym. 938, and notes to S. C. in 1 Smith's

*The learned Judges, not agreeing in opinion, now delivered judgment seriatim. [*634]

WIGHTMAN, J.—The plaintiffs in this case complained of damage done to houses and buildings, in the occupation of a person who held them as their tenant, by the improper working of coal-mines near to such houses and buildings, without leaving any proper support to their workings.

The plaintiffs, in their declaration, after stating that the reversion of the premises belonged to them, alleged that they were entitled to have the messuages and buildings supported by the mines, earth, and soil underground, contiguous and near to and under them.

The defendant pleaded Not guilty; and two traverses, upon which no question is made; and, 4th, that the plaintiffs were not entitled to have their messuages and buildings supported by the mines, &c., as alleged; and, 5th, the Statute of Limitations.

It appeared by the award of the arbitrator, to whom the case was referred to find the facts, that the plaintiffs were the owners of the surface upon which the buildings had been erected more than forty years before the injury complained of; but that the mines and minerals under the plaintiffs' land and buildings belonged to other persons, under whom the defendant claimed. The defendant, and others with whom he was associated, worked out the coal under plaintiffs' land and also under the adjoining lands. And, in the year 1848, they purchased and worked the coal under the land of Daniel Simpson; and in 1849 removed the pillars which had been left in that land. And in 1850 the roof and superincumbent soil fell in and formed what is called a thrust. Simpson's *land, where the roof fell in, is 280 yards from the plaintiffs' premises. The previous workings of the defendant had caused [*635] no damage whatever to the plaintiffs' premises: but the effect of the thrust occasioned by the defendant's removal of the pillars in Simpson's land in 1849 was gradually to dislocate and throw down the pillars in the neighbouring workings, until, in 1854, the plaintiffs' land and houses were injuriously affected by the subsidence of the surface.

Under these circumstances, the great question before us was, From what period the statute should run: whether from the accruing of the damage in 1854, or from the more remote cause in 1849; the arbitrator having found that the "thrust" then caused by the defendant's taking away the pillars under Simpson's land was the sole cause of the damage to the plaintiffs' premises.

For the purpose of determining this question, it is necessary to consider the nature of the right claimed by the plaintiffs.

The plaintiffs say that they are entitled to have their messuages and buildings supported by the mines, earth and soil underground, contiguous and near to and under them; and the declaration is in the form adopted in *Nicklin v. Williams*, 10 Exch. 259,† stating that they are entitled to such support, without saying whether by prescription, grant, or as an

L. Ca. 212; *Embrey v. Owen*, 6 Exch. 353;† *Short v. McCarthy*, 3 B. & Ald. 626 (E. C. L. R. vol. 5); *Imperial Gas Light and Coke Company v. London Gas Light Company*, 10 Exch. 39;† *Clegg v. Dearden*, 12 Q. B. 576 (E. C. L. R. vol. 64); *Firmstone v. Wheeley*, 13 L. J. N. S. Exch. 361; S. C. 2 D. & L. 203; *Rosewell v. Prior*, 2 Salk. 460; *Rex v. Pedly*, 1 A. & E. 822 (E. C. L. R. vol. 28); *Ward v. Ward*, 7 Exch. 838;† *Howell v. Young*, 5 B. & C. 259 (E. C. L. R. vol. 11); *Wordsworth v. Harley*, 1 B. & Ad. 391 (E. C. L. R. vol. 20); *Lord Oakley v. The Kensington Canal Company*, 5 B. & Ad. 138 (E. C. L. R. vol. 27).

easement by enjoyment for twenty years. The defendant denies that the plaintiffs are entitled to have their premises supported as they allege: and that is one of the issues in the case.

The arbitrator does not find that there was any negligence or improper *636] working of the mines under the *plaintiffs' premises, or under the land immediately contiguous thereto, nor that any part of the damage to the plaintiffs' property arose from such working; but that the damage arose solely by the defendant's working the mines in other lands not contiguous to the plaintiffs' premises, but at a distance of 280 yards from them. The owner of those lands had as much right to work the mines in them as the owner of the plaintiffs' land had to build houses upon his, subject only to the duty of so using his own property that he should not injure that of another.

Upon consideration of all the cases, it appears to me that the cause of action in such a case as the present is founded upon a breach of duty on the part of the defendant, by so using his own property as to injure that of his neighbour, and not upon any right of the plaintiffs to an easement in, upon, or over the land of their neighbours. Where ancient buildings are standing upon the plaintiffs' land, the defendant must take care not to use his own land in such a manner as to injure them. The language used in some of the cases is not very clear: but it appears to me that the cases of *Wyatt v. Harrison*, 3 B. & Ad. 871 (E. C. L. R. vol. 23); *Chadwick v. Trower*, 6 New Ca. 1 (E. C. L. R. vol. 37); (a) *Partridge v. Scott*, 3 M. & W. 220;† *Roberts v. Read*, 16 East 215; and the older cases of *Slingsby v. Barnard*, 1 Rol. R. 430; *William Aldred's Case*, 9 Rep. 57 b; and the opinions expressed by the judges in giving their judgment in the case of *Rowbotham v. Wilson*, 8 E. & B.

*637] 123 (E. C. L. R. vol. 92), (b) in the *Exchequer Chamber at the sittings after last Trinity Term, are authorities to show that the right claimed by the plaintiffs is not a right founded upon the presumption of a grant or easement, but is the common right of an owner of land not to be injured in his property by the way in which the defendant uses his, according to the two maxims of the law, "*Prohibetur ne quis faciat in suo quod nocere possit alieno*," and "*Sic utere tuo ut alienum non lædas*."

In this view of the case, and upon the above authorities, I must confess that I am not satisfied with the judgment of the Court of Exchequer in the case of *Nicklin v. Williams*, 10 Exch. 259,† (by which I should otherwise have considered I was bound), in which it was held that in such a case as the present the action was founded upon an injury to a right, and not upon the consequential damage, and that a cause of action would accrue if so much coal or substratum was taken away as might eventually deprive the plaintiffs of the support to which they were entitled, though no actual damage occurred, and perhaps never might occur. If that were so, the owner of the adjacent land could not abstract the minerals, nor avail himself of the full benefit of his property, without being liable to an action, though, before any damage had actually occurred, he had, by substituting other means of support, removed all danger of injury to

(a) In Exch. Ch., reversing the judgment of C. P. in *Trower v. Chadwick*, 3 New Ca. 334 (E. C. L. R. vol. 11).

(b) In Exch. Ch., affirming the judgment of Q. B. in *Rowbotham v. Wilson*, 6 E. & B. 293 (E. C. L. R. vol. 88).

the plaintiffs' property. This would be wholly inconsistent with the right of the defendant to use his property as he pleases, provided he does not injure that of his neighbour: and I am of opinion that the plaintiffs' cause of action arose when his property was injured: and, as no actual damage occurred more than six years before the action brought, *that the Statute of Limitations is no bar; and that the plaintiffs [*638 are entitled to our judgment upon that plea.

With respect to the right of action of the plaintiffs generally, I am of opinion that, as the defendant must, upon the facts found by the arbitrator, have known of the buildings upon the plaintiffs' land, and of the state in which the supports were left by himself under their land and buildings, and under the adjacent land, he was bound, in working the mines under Simpson's land, to use such reasonable care and caution as not to throw down or weaken the supports which he left under and near to the plaintiffs' land and buildings, and that he is liable to an action for the damage arising from his mode of working in Simpson's land. In the sense in which I construe the plaintiffs' allegation of title, I think that they are entitled, and that the verdict should be entered for them upon all the issues.

With respect to the damages, I am of opinion that, as the action is founded upon the consequential damage, the plaintiffs can only recover in this action to the extent of the damage they have actually sustained, which may include, not merely what they are obliged to lay out in actual repair, but the diminution in the value of the premises by reason of the damage.

My opinion is the same in the other actions; in each of which I think the verdict should be entered for the plaintiffs.

COLERIDGE, J.—I have had the opportunity of reading the judgments of my Lord, my brother Wightman, and my brother Erle, in this case: and, after much consideration and long doubting, I adopt the conclusion to which my Lord and my brother Erle have come.

*My brother Wightman has so clearly and fully stated the [*639 pleadings and the facts, that I need not repeat them. It seems to me that, according to his statement, the interest which the plaintiffs allege in themselves, and to have been injured by the defendant, is in the nature of a right growing out of ownership, or incident to the ownership, of land, and not an easement on the land of another arising from grant or in any other way. It is a right which, in some measure, contracts the exercise of dominion in the owners of adjoining or neighbouring lands over these lands: but then it is a restraint which is mutual, and therefore not unjust. It consists in making it unlawful for the owner of land, as such, so to deal with it as to withdraw from his neighbours' land that support which is necessary to maintain it in its natural condition. If he so deals with his land, he uses it so as to injure his neighbours: and the forbiddance of this I still venture to think not uselessly or imperfectly expressed in the maxim of the Roman law, *Sic utere tuo ut alienum non lædas*. We are all agreed on the existence of this right by our law, and that a violation of it is actionable: the question is, under what circumstances and at what time the right of action arose in this case.

The Statute of Limitations makes it material in the present case to determine this, but can have nothing to do with deciding it: the ques-

tion would remain exactly the same if the statute had not been pleaded, or had never been passed. Neither can the knowledge of the parties be material in deciding the question: the right of action vests in a party, whose rights are injuriously affected by the act of another person, at the time when the right is so affected, whether he knows of the injury being done or is ignorant of it, and against the party whose *act it is, whether he was conscious of its injurious nature or not. *640] I do not stop to prove these propositions; for I do not think they can be disputed. Such considerations, therefore, should not be allowed to have any place in the argument, because they only tend to create prejudice on one side or the other by making out a case of apparent hardship.

But it seems to me that the answer to the question is to be found in the principle of law now well established, that the injury to a right imports conclusively a damage done; and therefore that a right of action arises the moment any act is done which is an infringement of the right, although no visible damage or inconvenience in the popular sense can then be proved. And this stands on the soundest reason. In all such cases, in truth, the act does injure that which is the most valuable part of the plaintiffs' possession, namely the right: it weakens it in its evidence; such acts may be again and again repeated before the visible damage arises; and, when it does, and the action is brought, although it could not be said that the previous acts were acquiesced in, if by the hypothesis they were not actionable, yet, even so, by their frequency and the lapse of time they would have made it more difficult to prove the right. Let it be supposed that no action would lie for a trespass on the surface of land, unless some actual damage were proved; and it would be seen at once how, in a case of disputed boundary, the difficulty of proof would be increased. But surely any right is diminished in value if you make it more difficult to maintain it. Accordingly this point is now well settled; and it may be enough to refer to the learned note on *Mellor v. Spateman*, 1 Wms. Saund. 346, *a*, *b*, note (2).

*641] *Another principle may be called in aid of the preceding, which is this: that, where a right of action is thus vested, and an action is brought for the act alleged to have so injured it, the damages given by the jury for that act must be taken to embrace all the injurious consequences of that act, unknown as well as known, which shall arise hereafter, as well as those which have arisen. For the right of action is satisfied by one recovery. *Fetter v. Beale*, 1 Ld. Raym. 339, 692, S. C. 1 Salk. 11, is an authority for this. There the plaintiff had received a blow on the head, and sustained small apparent injury, and recovered small damages. Afterwards, in consequence of the blow, a portion of his skull was detached; and it appeared that in truth the skull had been fractured. He brought a second action, which was attempted to be supported on the ground that the former recovery was for a mere battery, and this for maihem. But it was held that no action lay; for there was but one blow; and that was the cause of action in both suits, and not the consequences: and the distinction was pointed out between this case and one of continuing nuisance, where each continuance was a fresh nuisance. No fresh action therefore arises by reason of subsequent new damage resulting from the act, if the act itself were actionable; for, if the action were brought, all the damages

which he ever could recover for that injury would be recovered by the plaintiff in that action, if he succeeded.

On these short grounds, I think the Statute of Limitations was an answer to the plaintiffs' claim, and that our judgment ought to be for the defendant.

*The same learned Judge then proceeded to read the judgment of [*642

ERLE, J.—Upon the facts, as stated by my brother Wightman, I am of opinion that the right to support is one of the ordinary rights of property, analogous to the right to a natural stream, incidental to all land, and not an easement or right acquired by grant or otherwise. It is decided that the right to lateral support from adjoining land is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil; and that the right of the owner of the surface to have it supported by the mineral strata stands on the same principle: *Humphries v. Brogden*, 12 Q. B. 739, 744 (E. C. L. R. vol. 64).

From this doctrine it seems to follow that a cause of action accrues when this right is violated, and that it is violated when an excavation is made which takes away the support to which the surface is entitled, so as to cause damage to the surface, either immediately or indirectly, by the operation of the laws of nature, after a time. Such an excavation is an injury to the right, and a cause of action, before the actual damage has accrued.

This point was considered by the Court of Exchequer in *Nicklin v. Williams*, 10 Exch. 259;† and it is there laid down that the cause of action accrues on the removal of the stratum of support, and not on the resulting damage; and the cases of *Sutton v. Clarke*, 6 Taunt. 29 (E. C. L. R. vol. 1), *Roberts v. Read*, 16 East 215, and *Gillon v. Boddington, Ry. & M.* 161 (E. C. L. R. vol. 21), are distinguished on the [*648 ground that the cause of action in them was the consequential damage, not the injury to the right: and they may be further distinguished on the ground that they were all cases turning on a short limitation of a few months in actions by parties aggrieved by works done under a statute.

If the party making the excavation intends to substitute a support within a reasonable time, it may be matter of defence. If it be said that the owner of the surface may not know of the excavation, or, knowing of it, may not know that it will damage his surface, it may be answered that the miner excavating may not be able to foresee distant results from his acts, and that a responsibility after a long time, and a long series of causes and effects, is a great hardship upon him.

As a general principle, it is difficult to conceive a cause of action from damage when no right has been violated, and no wrong has been done. The maxim, *Sic utere tuo ut alienum non lædas*, is mere verbiage. A party may damage the property of another where the law permits; and he may not where the law prohibits: so that the maxim can never be applied till the law is ascertained; and, when it is, the maxim is superfluous. The check upon mining, for the protection of the surface, is for the advantage of the surface: that advantage is secured by the decision in *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64). The surface owner taking that advantage may not unreasonably be held to

take it with ordinary legal incidents, and, among others, a liability to be barred by six years from the wrongful act. In case of mining operations which are a trespass, the *statute runs from the trespass, *644] though the party may have been ignorant of the act done. The same rule may with equal justice apply to a surface owner, notwithstanding he may have been ignorant of the violation of his right to support.

Lord CAMPBELL, C. J.—Having referred to all the authorities relied upon in this case, and considered the principles by which it ought to be decided, I have, after considerable doubt, come to the conclusion that the defendant is entitled to our judgment on the fifth plea.

I agree in the opinion that the right of support which the plaintiffs claim is a natural right of property, to be presumed till (as in *Rowbotham v. Wilson*, 8 E. & B. 123 (E. C. L. R. vol. 92), (a)) evidence is given to rebut the presumption; and that such a right is not to be considered an easement or servitude arising from grant. But the consequence does not seem to me to follow, that the Statute of Limitations cannot begin to run for an injury to such a right till there has been an actual subsidence of the surface. If the subjacent strata have been removed without leaving ribs or pillars to support the surface, and without any indication of an intention to substitute artificial means of proping up the surface, and without a practical possibility of doing so, whereby, according to the laws of nature, the surface must in time subside, I think that there has been an injury to the right, with a damage to the owner of the surface, for which an action might be maintained. The general rule cannot be altered by an ignorance of facts or a difficulty of proof, which in some instances may arise; for existing facts, *645] which may be ascertained, must *be supposed to be known and capable of being proved by all who have an interest in them. Instances might easily be put where, without any actual subsidence of the surface, the danger of a subsidence from the removal of the subjacent strata may be shown to be imminent, so that the occupation of the surface may be perilous to life, and the marketable value of the surface may be greatly diminished. Is it to be said that under such circumstances there is no cause of action till the crash comes by the collapse of the unsupported surface? I apprehend that an injunction might be obtained against excavating the minerals in a manner likely to produce such effects, and that an action might be maintained before the disastrous effects have been actually produced. But the Statute of Limitations must run from the time when the acts were done which cause the damage: and, if none of those acts were done within six years, the Statute of Limitations is a bar, although the actual damage from the disintegration of the strata constituting what is called the "surface" may not have happened till recently before the action was commenced.

The present appears to me to be an action for injury to a right, and not merely for what is called *consequential damage*. Looking to my brother Wightman's precept, *Sic utere tuo, &c.* (which I would treat with more reverence than my brother Erle), I say that there was a lesion of what belonged to the plaintiffs when the defendant did that which necessarily led to all the damage and loss of which the plaintiffs com-

(a) In Exch. Ch., affirming the judgment of Q. B. in *Rowbotham v. Wilson*, 6 E. & B. 593 (E. C. L. R. vol. 88).

plain. The removal of the pillars in Simpson's land, and the "thrust" which followed in 1850, appear, from the statement of the arbitrator, directly and necessarily to have produced the subsidence of the surface in 1854.

*With regard to the authorities cited, I will merely remark that *Nicklin v. Williams*, 10 Exch. 259,† is expressly in point; [*646 and that the decisions relied upon to show that this is an action for consequential damage, complete only upon the subsidence of the surface, may, I think, be distinguished from it.

For these reasons, I concur in opinion with my brothers Coleridge and Erle, that on the fifth plea there ought to be judgment for the defendant.

Judgment for the defendant on the fifth plea.

IN THE EXCHEQUER CHAMBER.

[June 18, 1859.]

THE plaintiffs appealed against the above decision. The case was argued in the Exchequer Chamber in Easter Vacation, 1859.(a)

Manisty, for the appellants (plaintiffs below).—The right of the plaintiffs is not to an easement; it is an ordinary right of property: *Rowbotham v. Wilson*, 8 E. & B. 123 (E. C. L. R. vol. 92).(b) The right is to have their land supported; and the mine-owner is guilty of no wrong as long as he does not interfere with the support, though he take away all the coal. The injury complained of is said, by the learned Judges constituting the majority below, to be an injury *to a [*647 right; so that the invasion of the right alone, without any other injury, creates a full right of action. That is, in effect, to sanction an action *quia timet*. This doctrine would in fact lead directly to consequences inconsistent with the decision of *Roberts v. Read*, 16 East 215, where it was held that an action might be brought for the undermining of a wall which had fallen within the time of the limitation, though the act of undermining was more remote than the limited time; the complaint being for the consequential damage. That case was strongly approved of by Abbott, C. J., in *Gillon v. Boddington, Ry. & Moo.* 161 (E. C. L. R. vol. 21); and it was recently relied upon by Cresswell, J., in *Rowbotham v. Wilson*, 8 E. & B. 158 (E. C. L. R. vol. 92). [WILLES, J.—I think it was held that, where a man had made a heap of materials which afterwards fell down so as to injure the adjoining land, trespass might be maintained: can there be a power of electing between case and trespass?] An action might be maintained for keeping up such a heap until the mischief occurred; but not if it were removed before the damage. [BYLES, J.—Take the common case of a man allowing trees to be on his land which, if they are allowed to grow for a certain time, will injure the land of his neighbour; can the neighbour maintain an action as soon as the trees are planted, or as soon as an acorn is put in, and before the trees have grown so as to be injurious?] That con-

(a) May 13th and 14th. Before Willes and Byles, Ja., and Martin, Watson, and Bramwell, Ba.

(b) In Exch. Ch., affirming the judgment of Q. B. in *Rowbotham v. Wilson*, 6 R. & B. 598 E. C. L. R. vol. 88.

sequence, absurd as it is, would follow from the principle affirmed in the Court below. In *Howell v. Young*, 5 B. & C. 259 (E. C. L. R. vol. 11), where an attorney was sued by his client for negligently taking an insufficient security for a loan, it was held that the time of limitation *648] ran from the taking of the security, and not from the *discovery of the insufficiency. There no fresh damage had occurred, the loss of interest constituting only a measure of the damage done by the original loan of the money on insufficient security: there was, as Holroyd, J., points out, "no new misconduct or negligence." Here that of which the plaintiffs complain is the mischief done by the defendant keeping the mine in an insecure state up to the time of the subsidence. Suppose an action to have been brought when the undermining first took place, what would have been the measure of damages? And would it not have been a sufficient answer, that the defendant had not used his own so as to injure that which was another's? Besides, if the action then lay, it would not have been barred by the defendant at a later period, before action brought, taking steps to prevent the mischief from being so propagated as to reach the plaintiffs' land at all. That would not have barred a right of action once vested: yet how could the defendant have been liable for an act which could never do harm? Suppose a landowner makes a drain, and then discovers that, owing to a quicksand on his land, the drain will injure his neighbour's land unless steps be taken to prevent this; and that he thereupon does take such steps, and no damage follows: he surely is not liable to an action.

Bovill, *contrà* (for the defendant below).—The argument on the other side assumes that the excavation was made in a place at which the plaintiff had no right to support: but that is contrary to the fact. *Nicklin v. Williams*, 10 Exch. 259,† is directly in point. There land had been undermined by defendant, so as to cause the plaintiff's *649] *houses to subside; and for this a compensation was agreed upon: it was held that the plaintiff could not recover for the damage caused by a subsequent subsidence, no fresh act having been done by the defendant; for that the compensation covered the prospective damages incidental to the one act. *Wightman, J.*, appears to consider that there is, till the subsidence occurs, no infringement of the rule *Sic utere tuo ut alienum non lædas*. But what is the lesion? It is the violation of the right to support: the injury is complete when the right is violated. In *Nicklin v. Williams*, *Parke, B.*, distinguished *Roberts v. Read*, 16 East 215, and *Gillon v. Boddington*, Ry. & Moo. 161 (E. C. L. R. vol. 21), on the grounds that the right in those cases was not injured, so that the complaint was entirely for the actual damage, and that there was an intermediate agency causing the mischief. These circumstances distinguish those two cases also from the case now before the Court. [BRAMWELL, B.—What do you say the right is? To the natural support, or to either that or an adequate substitute?] That may be a question of some difficulty. The declaration here claims the right of the support of the ground: perhaps, if an adequate support had been substituted, that might have answered the action. [BYLES, J.—Has the plaintiff a right to more than a sufficient support for the time being?] He has a right to a permanent support; and, if this is taken away, he may instantly complain though the fall takes place later; just as the owner of an upper story may complain of that being done in a lower story which

certainly, though not instantly, will cause the upper story to fall. Suppose the plaintiff's house were put up for *sale in the interval between the undermining and the subsidence, it would be worth [*650 a less price by reason of the undermining. There is indeed here an allegation of special damage; but that is not essential to the action. The distance between the house and the spot where the undermining took place affects only the question of proof; and the same may be said as to the interval of time. [BRAMWELL, B.—Suppose B.'s land is next to my land and supports my house; and that B. so works that my house, for want of the support, would fall, but for A.'s land, which, lying beyond B.'s, supports all: and that then A. withdraws his support, so that B.'s land, being unsupported, no longer supports my house. Can I sue B.?] If the owner of the house had the right to the support of B.'s land he could sue B.; though, probably, the case has not arisen. [BYLES, J.—In all the cases, the right insisted upon is that of support from the adjoining land: that support the plaintiff has had till the effects of the distant working reached the adjoining land.] All the land is adjoining or "contiguous" in the sense of the declaration, including that in which the working took place. It is not difficult to put extreme cases; but the common sense of mankind would apply the rule; and a jury would find for plaintiff or defendant according as they found that there was or was not damage. [MARTIN, B.—Has it ever been decided that the action will lie without damage?] Perhaps not, in fact. [MARTIN, B.—Would not the action lie without any allegation of right?] If it would, that would be only because the right would be implied from the facts stated. It is to be kept in mind that the rule as to the support of mere land is different from the rule as to the support of houses built on the land. In Gale's Treatise on the Law of Easements, p. 216, it is said: * "As far as the mere support to the soil is concerned, [*651 such support must have been afforded as long as the land itself has been in existence; and it would seem, in all those cases at least in which the owner of land has not, by buildings or otherwise, increased the lateral pressure upon the adjoining soil, that he has acquired by such ancient enjoyment a right of the support of it, rather as a right of property than as an easement, as being necessarily and naturally attached to the soil." But, at p. 218: "Where, however, anything has been done to increase the lateral pressure, as where buildings have been erected, it appears to be clearly settled that no man has a right to such increased support unless the building, or other thing which makes it necessary, is of ancient erection." The writer comes to the conclusion established in *Partridge v. Scott*, 3 M. & W. 220,† which is that, in the case of a house, there must be circumstances from which a grant may be presumed. [WATSON, B.—That doctrine has been much questioned, as in *Rowbotham v. Wilson*, 8 E. & B. 123 (E. C. L. R. vol. 92), especially in the elaborate judgment of my brother Cresswell.] Mr. Gale (p. 223) cites from the judgment in *Partridge v. Scott*: "Rights of this sort, if they can be established at all, must, we think, have their origin in grant." If this were not so, every house would, at the moment of being built, acquire the right to support: but this is contrary to all the authorities. [MARTIN, B.—Judges often have, at least I myself often have, left it to the jury to say whether the building of the house has made any difference as to the subsiding of the land.] The general

law is laid down in *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64), *Smart v. *Morton*, 5 E. & B. 30 (E. C. L. R. vol. 85), *652] *Roberts v. Haines*, 6 E. & B. 643 (E. C. L. R. vol. 88). (a) [BRAMWELL, B.—*Humphries v. Brogden* seems to me to be rather against you. The effect of that decision is that the owner of the surface has a right to have it supported: you say he has a right to have it supported by the land in its natural state. According to *Humphries v. Brogden*, if artificial support had been substituted, there would have been no ground of complaint. MARTIN, B.—The rule in note (2) to *Mellor v. Spateman*, 1 Wms. Saund. 346 b, is that the action lies where a right is injured, so as to furnish “evidence in future in favour of the wrongdoer:” but that fails here.] It is not laid down that that is the only case in which the invasion of a right is a ground of action. *Nicklin v. Williams*, 10 Exch. 259,† asserts the principle generally. [BYLES, J.—If one might suppose the original act to cause damage inevitably and irretrievably, it might be as you say.] Damage is not requisite at all: the action lies for the invasion of the right; and *Nicklin v. Williams*, which affirms that view, is in conformity with *Ashby v. White*, 2 Ld. Raym. 938, and with Mr. Smith’s note on that case, 1 Smith’s L. Ca. 212. [WILLES, J.—If an action be brought for an infringement of a right, and damages be recovered for the injury thereby done, will the consequence be that no action can be brought for a repetition or continuance of the infringement?] There can be no fresh action without a fresh cause of injury. [WILLES, J.—You have here two successive causes of injury, the digging and the neglecting afterwards to supply a support.] According to the authorities, as pointed *658] out, the right, alleged in *the declaration and confessed in the plea of the Statute of Limitations, must be taken to have originated in grant (either by deed or prescription) of the owner of the land where the undermining complained of took place. The undermining violated that right, and gave a cause of action, whether there was damage or not, just as putting a bar unlawfully across a way to which the plaintiff was entitled would of itself be a cause of action; *Bower v. Hill*, 1 New Ca. 549, 555 (E. C. L. R. vol. 27), *Embrey v. Owen*, 6 Exch. 353, 368,† *Rodgers v. Nowill*, 5 Com. B. 109 (E. C. L. R. vol. 57), *Blofield v. Payne*, 4 B. & Ad. 410 (E. C. L. R. vol. 24), *The Metropolitan Association v. Petch*, 5 Com. B. N. S. 504, 511 (E. C. L. R. vol. 94); and the jury may estimate prospective damages: *Hodsoll v. Stallebrass*, 11 A. & E. 301 (E. C. L. R. vol. 39); *Violett v. Sympson*, 8 E. & B. 344 (E. C. L. R. vol. 92); *Lord Oakley v. The Kensington Canal Company*, 5 B. & Ad. 188 (E. C. L. R. vol. 27); *Clegg v. Dearden*, 12 Q. B. 576 (E. C. L. R. vol. 64); *Wordsworth v. Harley*, 1 B. & Ad. 391 (E. C. L. R. vol. 20). *Rowbotham v. Wilson*, 8 E. & B. 123 (E. C. L. R. vol. 92), was for an injury to the surface only: that case, as has been pointed out, is distinguishable from the case of injury to a house. It is suggested that the rule for which the plaintiff contends would produce hardship, because the plaintiff did not know of the act. But the rule has repeatedly been held to apply in cases where the same hardship would exist: *Howell v. Young*, 5 B. & C. 259 (E. C. L. R. vol. 11);

(a) In Q. B.; affirmed on appeal, in Exch. Ch.: *Haines v. Roberts*, 7 E. & B. 625 (E. C. L. R. vol. 90).

Brown v. Howard, 2 Br. & B. 73 (E. C. L. R. vol. 6); *Imperial Gas Light and Coke Company v. London Gas Light Company*, 10 Exch. 39.†

Manisty, in reply.—An action would certainly lie for the infringement of the right: but the right here was, to have the house supported; and, as long as it was *supported, that right was not infringed. In *Nicklin v. Williams*, 10 Exch. 259,† the disturbed stratum [*654] was itself immediately necessary to the support of the house, as was assumed by the Court in the judgment. Probably, however, the language of that judgment would have been different if the Court had had before them the decision of the Exchequer Chamber in *Rowbotham v. Wilson*. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the Court.

This is a proceeding in error upon a judgment of the Court of Queen's Bench, and was brought to question the decision in that case and a judgment of the Court of Exchequer in *Nicklin v. Williams*. In the Court of Queen's Bench Mr. Justice Wightman differed from the majority of the Court; some of whom expressed their opinion with very great doubt.

The question argued before us may be stated in a very few words. The plaintiff was owner of the reversion of an ancient house. The defendant, more than six years before the commencement of the action, worked some coal-mines 280 yards distant from it. No actual damage occurred until within the six years.

Question: Is the Statute of Limitations an answer to the action? Or, in other words, did the cause of action accrue within the six years? The majority of the Court of Queen's Bench thought it did not.

The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *primâ facie* a right of property analogous to the flow of a natural river, or *of air; *Rowbotham v. Wilson*, 8 E. & B. 123 (E. C. L. R. vol. 92); though there may be cases in which it [*655] would be sustained as matter of grant (see *The Caledonian Railway Company v. Sprot*, 2 Macq. Sc. App. 449); whilst the latter must be founded upon prescription or grant, express or implied: but the character of the rights, when acquired, is in each case the same. The question in this case depends upon what is the character of the right; viz., whether the support must be afforded by the neighbouring soil itself, or such a portion of it as would be beyond all question sufficient for present and future support, or whether it is competent for the owner to abstract the minerals without liability to an action unless and until actual damage is thereby caused to his neighbour. The most ordinary case of withdrawal of support is in town property, where persons buy small pieces of land, frequently by the yard or foot, and occupy the whole of it with buildings. They generally excavate for cellars, and in all cases make foundations; and, in lieu of support given to their neighbour's land by the natural soil, substitute a wall. We are not aware that it has ever been considered that the mere excavation of the land for this purpose gives a right of action to the adjoining owner and is itself an unlawful act, although it is certain that if damage ensued a right of action would accrue. So also we are not aware that, until the case of *Nicklin v. Williams*, 10 Exch. 259,† it had ever been supposed that the getting coal or minerals, to whatever extent, in a man's own land was an unlawful

act, although, if he thereby caused damage to his neighbour, he was undoubtedly responsible for it. The right of action was supposed to arise from the damage, not from the act *of the adjoining owner in his
 *656] own land. The law favours the exercise of dominion by every one upon his own land, and his using it for the most beneficial purpose to himself.

As we have already said, the defendant's proposition is that the adjoining owner is entitled to have the adjacent land remain in its natural condition; he does not and cannot contend that an artificial substitute would prevent a cause of action. For, if he did, if he admitted that a man might excavate the natural soil to an extent dangerous to the adjoining owner, provided he applied a remedy in time to prevent damage, as by putting props or a wall, this consequence would follow: that he must have time within which to do it; and that time would be any time until damage resulted; which, in effect, would be to say that there was no cause of action till actual damage. If the defendant is right, these consequences follow: whenever a mine or quarry is worked, the worker may be subjected to actions by all surrounding owners; nay, they would in self-defence be compelled to bring them, if there was any reasonable ground to suppose that the working would in time produce damage to their property. It would be in vain that the worker should say: "You will not be injured; the workings are not injurious; if they turn out likely to be so, I will take means to prevent it; at all events wait till you are injured." Vexatious and oppressive actions might be brought, on the one hand; and, on the other, an unjust immunity obtained for secret workings of the most mischievous character, but the result of which did not appear within six years. The inquiry in such cases would be little better than speculative. The character of the soil, the inclination of the strata, the depth and extent of the works,
 *657] the distance and nature of the land supposed *to be in danger, and other considerations, would make the inquiry of such a character that the only prudent verdict would be "Not proven." In many cases, damages would be given where none could be sustained; while they would, in other cases, be given where they ought to be withheld.

There is no doubt that for an injury to a right an action lies: but the question is, What is the plaintiff's right? Is it that his land should remain in its natural state, unaffected by any act done in the neighbouring land, or is it that nothing should be done in the neighbouring land from which a jury would find that damage might possibly accrue? There is no doubt that in certain cases an action may be maintained, although there is no actual damage. The rule laid down by Serjeant Williams, in note (2) to *Mellor v. Spateman*, 1 Wms. Saund. 346 b, is that, whenever an act injures another's right, and would be evidence in future in favour of the wrongdoer, an action may be maintained for an invasion of the right, without proof of any specific damage. This is a reasonable and sensible rule; but it has no application to the present case; for the act of the defendant in getting the coal would be no evidence in his favour as to any future act: getting the coal was an act done by him in his own soil by virtue of his dominion over it. If the question were unaffected by decision, we cannot but think that the contention on the part of the plaintiffs in error is correct. That on behalf of the defendant is, that the action must be brought within six

years after the excavation is made, and that it is immaterial whether any actual damage has occurred or not. The jury, according to this view, would *have therefore to decide upon the speculative question, [*658 Whether any damage was likely to arise; and it might well be that in many cases they would, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur, when the most serious injury afterwards might in fact occur, and in others find and give large sums of money for apprehended damage, which in point of fact never might arise. This is certainly not a state of the law to be desired. On the other hand, the plaintiffs in error rely upon the ordinary rule that *damnum* and *injuria* must concur to confer a right of action, and that, although only one action could be maintained for damage in respect of such a claim, nevertheless it would be essential that some damage should have happened before a defendant was made liable for an act done in his own land. Actions upon contract and actions of trespass for direct injuries to the land of another are clearly distinguishable.

No authority is cited in *Nicklin v. Williams*, 10 Exch. 259,† for the judgment there given: and, although the judgment in that case is distinct upon the point, it nevertheless was extrajudicial; for before the former action was commenced it is obvious that actual damage had been sustained; in which case another principle applies, viz., that no second or fresh action can under such circumstances be brought for subsequently accruing damage: all the damage consequent upon the unlawful act is in contemplation of law satisfied by the one judgment or accord. We are not insensible to the consideration that the holding damage to be essential to the cause of action may extend the time during which persons working *minerals and making excavations [*659 may be made responsible; but we think that the right which a man has is to enjoy his own land in the state and condition in which nature has placed it, and also to use it in such manner as he thinks fit, subject always to this: that, if his mode of using it does damage to his neighbour, he must make compensation. Applying these two principles to the present case, we think that no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff; and that the cause of action did accrue when the actual damage first occurred.

We should be unwilling to rest our judgment upon mere grounds of policy; but we cannot but observe that a rule of law, or rather the construction of a Statute of Limitation, which would deprive a man of redress after the expiration of six years, when the act causing the damage was unknown to him, and when in very many instances he would be in inevitable ignorance of it, would be harsh, and contrary to ordinary principles of law.

The judgment must therefore be reversed, and judgment given for the plaintiffs. Judgment reversed.

The principle affirmed by the Exchequer Chamber in the decision of the foregoing case, that the right of support to soil by the adjacent and underlying strata, and, subject thereto, the correlative right to make use of such strata in any lawful and reasonable manner, are *jure naturæ*, or, in

other words, the natural incidents of property, and not of the character of easements, received the apparent approbation of the House of Lords in *Rowbotham v. Wilson*, 2 Law Times N. S. 642; and see *Brown v. Robins*, 4 Hurlst. & Norm. 186. This view is generally adopted in the United States, and it is further held as a consequence, that, except by grant and perhaps prescription, the owner of land cannot gain any additional right of support by the erection of buildings thereupon: *Lasala v. Holbrook*, 4 Paige 169; *Pantin v. Holland*, 19 Johnson 92; *Farrand v. Marshall*, 21 Barb. 407, S. C. 19 Id. 380; *Thurston v. Hancock*, 12 Mass. 221; *Rickart v. Scott*, 7 Watts 460; *Shreve v. Stokes*, 8 B. Monroe 453; *Charless v. Rankin*, 22 Mo. 388; *McGuire v. Grant*, 1 Dutch. 356; *Radcliffe v. Brooklyn*, 4 Comst. 202. The consequence necessarily is that until the owner of the subjacent strata does some act which is productive of actual and present injury to the owner of the neighbouring soil, no action can lie. The mere possibility or probability of future damage is no more a ground for an immediate remedy at law, than it would be in respect to acts done on the surface. The continued exercise of the right itself, as it is not necessary to its establishment, so cannot be an infringement upon the rights of others. Another circumstance of great weight, of course, is the fact that the abuse or excessive exercise of such a right is necessarily secret, and amounts to a *possessio clandestina*. See the observations of Bramwell, B., in *Solomons v. Vintners' Company*, 4 Hurlst. & Norm. 602. This being so, there can be no prescription of acquisition, which must always be founded on acts which are apparent, notorious, and adverse; or, as it is expressed in the Roman Law, *nec clam nec precario*: Dig. lib. viii., tit. 5, fr. 10; lib. xxxix., tit. 3,

fr. 1, § 23; 2 Pardessus Trait. des Servitudes; Savigny, Possession, trans. by Perry, 382; Mackeldey Droit Rom. § 326. This was the ground taken by the Supreme Court of Pennsylvania in *Wheatley v. Baugh*, 25 Penn. St. 533, where it was held that the use of a spring which depends for its supply upon percolations through the adjoining strata, for the purposes of a tannery, by the owner of the land from which it issues, though for more than twenty-one years, would not create the presumption of a grant, so as to deprive the owner of the adjoining land of the use of his land for mining or other lawful purposes, though thereby the spring may be destroyed. "No man," said Chief Justice Lewis, in that case, "can be barred by a statute of limitation for not bringing his action within the prescribed period, until it is first shown that he had a cause of action which he could have maintained. In analogy to the statute, no presumption can arise against a party on the ground of long enjoyment of a privilege by another, until it is shown that the privilege, in some measure, interfered with the rights of the party whose grant is proposed to be presumed, and that he had a legal right to prevent such enjoyment by proceedings at law. * * * Silence or acquiescence, where one is not injured, and has no cause of complaint, can never deprive him of his rights on the ground of presumption of a grant." See also *Hoy v. Sterrett*, 2 Watts 330.

There is nothing in this doctrine to interfere with the rule that an action will lie for nominal damages for the infringement of a right which is accompanied by no appreciable injury, because, otherwise, if continued without interruption for a sufficient time, an easement might be acquired by prescription. See *Pastorius v. Fisher*, 1 Rawle 27; *Kirkham v. Sharp*, 1 Whart.

333; Delaware and Hudson Canal v. Torrey, 33 Penn. St. 149; Blanchard v. Baker, 8 Greenleaf 253; Angell on Watercourses, § 135; Wood v. Waud, 3 Excheq. 748; Thompson v. Crocker, 9 Pick. 59. For in all this class of cases, 1st, the act which constitutes the infringement is of a visible apparent character, and, 2d, however trifling the injury, it is still an immediate and direct one. In cases such as that in the text, however, there is no direct injury, nor anything but the probability, more or less strong, of injury in the future, and therefore no present right of action. Besides, there must always be a dubious class of acts, for which the owner of land might well be permitted to sue, *ex majori cautela*, and yet which would

scarcely be defined enough to authorize the presumption of a grant from his omission to do so.

There can be no doubt, however, that in a suitable case, relief could be obtained in equity upon a discovery of such a working of mines as would certainly, or in reasonable probability, endanger the surface of the adjoining land, before any actual damage had been sustained: Farrand v. Marshall, 21 Barb. 409; Mitchell v. Dors, 6 Ves. 147. As to the power of the court to grant an inspection of the defendant's mine, in such a case, see Attorney-General v. Chambers, 12 Beav. 159; Bennitt v. Whitehouse, 2 Law T., N. S. 45, M. R.; Ennor v. Barwell, 3 Law T., N. S., 170, Vice Ch. Stuart.

***The Mayor, Aldermen, and Burgesses of the Borough of
CAMBRIDGE v. JOHN DENNIS. June 8. [*660**

The condition of a bond recited that S. had been appointed, under stat. 5 & 6 W. 4, c. 76, treasurer to a borough; and declared that it had been agreed that the obligor should join with S. in the bond for the due performance of the office: and the condition was declared to be that, if S. should duly perform the office according to the provisions of the said statutes, and of such statutes as might be thereafter passed relating to the said office, the bond should be void, otherwise, &c.

In a declaration by the obligee against the obligor, it was averred that, under the appointment in the condition mentioned, and divers subsequent annual appointments in every successive year, S. continued to be treasurer from the time of the execution of the bond till stat. 6 & 7 Vict. c. 89, passed, when S., in accordance with the last-mentioned Act, was appointed treasurer, and held office during the pleasure of the council till his death; and that the office, at S.'s last appointment, and until his death, continued, in its nature, functions, and duties, to be the same office as that mentioned in the condition. A breach was then assigned, alleging a malversation by S., while he remained treasurer as aforesaid, not stated to have occurred within the year from his first appointment, but, to wit, on a day named, which was subsequent to the appointment under stat. 6 & 7 Vict. c. 89.

Declaration held bad on demurrer. For that, under stat. 5 & 6 W. 4, c. 76 (sect. 58), the appointment mentioned in the condition was for one year only; and the liability of the obligor could not extend to the holding under stat. 6 & 7 Vict. c. 89, which (sect. 6) makes the office to be an office held during the pleasure of the council.

THE declaration alleged that one William Herring Smith, since deceased, the defendant, and one Charles Edward Brown, on 4th December, 1839, by their writing obligatory, sealed with their respective seals, acknowledged themselves to be jointly and severally bound to plaintiffs in 1000*l.*, to be paid to plaintiffs. Which said writing obligatory was and is subject to a condition thereunder written: Whereby, after reciting that the said W. H. Smith had been, under the provisions of the statute, &c. (5 & 6 W. 4, c. 76), appointed by the council of the

borough of Cambridge to be treasurer of the borough, and further reciting that it had been required and agreed that defendant and C. E. Brown should join with the said W. H. Smith in the said writing obligatory for the due execution of the said office, the condition of the said writing obligatory was and is declared to be such that, if the said W. H. Smith should well and faithfully account to the *plaintiffs for all and every sum and sums of money which might come to his hands, or be by him received as such treasurer as aforesaid, and did and should in all things well, truly, diligently, and faithfully, to the best of his abilities, and according to the provisions of the statute hereinbefore mentioned, and of such statutes as might be thereafter passed, relating to the said office, conduct himself in the said office of treasurer, and well and duly perform and execute all and every the duties which should belong to the said office, then the said writing obligatory should be void and of no effect, or else should remain in full force, &c. Averment that, under and by virtue of the said appointment in the said condition of the said writing obligatory mentioned, and of divers subsequent annual appointments made in every successive year by the council of the said borough, in accordance with the provisions of the said statute in the said condition mentioned and referred to, W. H. Smith continued to be, and was, treasurer of the borough from the time of the making of the said writing obligatory until and upon a certain day after the passing of an Act, &c. (6 & 7 Vict. c. 89), to wit, until and upon the 9th November, 1843. On which said last-mentioned day W. H. Smith was, in accordance with the provisions of the said last-mentioned Act, duly appointed to be treasurer of the borough, to hold the said office during the pleasure of the council for the time being of the borough, and continued to be and was treasurer of the borough under and by virtue of the said last-mentioned appointment until and upon a certain day passed before the commencement of this suit, to wit, until and upon 24th April, 1857. On which said last-mentioned day W. H. Smith died. That the said office of treasurer, *at the time of the said last-mentioned appointment of W. H. Smith thereto, and thence during his continuance therein, by virtue of the last-mentioned appointment, was, and continued, in the nature, functions, and duties thereof, the same office of treasurer in the said condition mentioned, and not another or different office. And, for assigning a breach of the condition of the writing obligatory, plaintiffs say that, whilst W. H. Smith continued to be and was such treasurer of the borough as aforesaid, to wit, on 1st September, 1847, and on divers days and times between that day and the time of the death of him the said W. H. Smith, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 2745*l.* 10*s.* 4*d.*, came into the hands of, and were received by, him, the said W. H. Smith, as such treasurer as aforesaid. Yet W. H. Smith did not in his lifetime, nor did his executors, or any one on his behalf, since his death, well and faithfully, or at all, account to plaintiffs for the said moneys so received by him as aforesaid, or any part thereof, but wholly neglected and omitted so to do; and the same still remain and are wholly unaccounted for to plaintiffs. And, for assigning a further breach of the condition of the writing obligatory, according to the form of the statute in such case made and provided, plaintiffs further say that W. H. Smith did not, whilst he continued and was such treasurer of the said borough as

aforesaid, well, truly, and faithfully, and according to the provisions of the several statutes in that behalf relating to the said office, conduct himself in the said office of treasurer, but, on the contrary thereof, he, the said W. H. Smith, whilst he continued to be and was such treasurer as aforesaid, to wit, on 1st September, 1847, and on divers days and times *between that day and the time of his death, wrongfully [*663 withheld and misapplied divers sums of money, amounting to a large sum of money, to wit, the sum of 2745*l.* 10*s.* 4½*d.*, which had been before then collected and received by him for and on account of plain-tiffs, and converted the same to his own use. By reason of which said several breaches the said writing obligatory became and is forfeited.

Demurrer. Joinder.

The defendant also pleaded two pleas; to which the plaintiffs demurred; and the defendant joined in demurrer: but, no judgment having been given on these pleas, the report is confined to the declaration.

Lush, for the plaintiff.—The declaration shows a good cause of action. On the other side, it will be argued that the bond was conditioned only for the due performance by Smith of the office to which he had been appointed and which he held when the bond was executed: and that this office, under stat. 5 & 6 W. 4, c. 76, s. 58, was for a year only; and that the breach is not shown to have occurred before the expiration of the year. But the condition comprehends the performance by him of duties falling upon him, not only under that statute, but under “such statutes as might be thereafter passed.” Now, under a subsequent statute, 6 & 7 Vict. c. 89, s. 6, the office is held during the pleasure of the council. Therefore, within the obvious meaning of the condition, Smith held, throughout, the office to which he was originally appointed. Accordingly, in *Mayor of Dartmouth v. Silly*, 7 E. & B. 97 (E. C. L. R. vol. 90), where the condition was that the [*664 *treasurer should act in conformance with stat. 5 & 6 W. 4, c. 76, “and all other laws and regulations now or hereafter to be in force touching the said office of treasurer,” it was held to extend to the performance of duties under stat. 6 & 7 Vict. c. 89, which passed after the original appointment. The words here are rather stronger; for they expressly refer to future statutes. The insertion of these words distinguishes the case from the authorities which may be cited on the other side, such as *Lord Arlington v. Merricke*, 2 Saund. 403.

Sir Fitzroy Kelly, contrà.—There can be no question as to the general rule. Where the principal incurs a new liability the bond is at an end, unless the language of the condition expressly includes such new liability. In that case, no doubt, the surety continues liable, because he was at liberty, if he chose, to contract to do so. He may contract to be liable for the performance of a duty under a fresh appointment. [Lord CAMPBELL, C. J.—And that, though the nature of the office be changed.] That may also be provided for, by apt words. Thus, in *Oswald v. Mayor, Aldermen, and Burgesses, of Berwick-upon-Tweed*, 5 H. L. Ca. 856,(a) the covenant had the words “in consequence of the said election, or under any annual or other future election:” and the liability was held to continue under future elections, though stat. 6 & 7 Vict. c. 89, had intervened. And in *Mayor of Dartmouth v. Silly*, 7

(a) In Dom. Proc., affirming the judgment of Exch. Ch. in *Mayor of Berwick v. Oswald*, 3 E. & B. 653 (E. C. L. R. vol. 77), which affirmed the judgment of Q. B. in *Mayor of Berwick v. Oswald*, 1 E. & B. 295 (E. C. L. R. vol. 72).

E. & B. 97 (E. C. L. R. vol. 90), there were the words "whether by virtue of *his present or any subsequent appointment to the said *665] office:" those words of course did away with any objection to the want of identity of appointment: but there are no such words here. Another objection there was raised, it is true, on the ground that the nature of the office was changed; and it was with reference to this objection that the words pointing to future regulations were insisted upon. But the objection here is to the want of words applicable to any future appointment at all. The mention here of "such statutes as might be thereafter passed" is for the purpose of meeting any objection arising from a legislative change in the duties during the year over which the appointment was to extend. They do not relate to a change in the length of tenure. Possibly, if a statute, during that year, had enlarged the time during which the then holders were to retain office, the words might have carried the liability on; though that seems very questionable. The decisions mentioned in notes (5), (e), (f), (g), and (h), to *Lord Arlington v. Merricke*, 2 Wms. Saund. 414, are conclusive as to the limitation of the liability in cases where there are not words like those in *Oswald v. Mayor, Aldermen, and Burgesses, of Berwick-upon-Tweed*, and *Mayor of Dartmouth v. Silly*. *Peppin v. Cooper*, 2 B. & Ald. 431, is exactly in point. There, as here, the office (of collector of assessed taxes under stat. 43 G. 3, c. 99, s. 12) was annual; and the condition of the bond (under sect. 13) was for faithful collecting "from time to time, and at all times thereafter," all rates, &c., "which then were, or should or might, at any time thereafter, be rated," &c.: and it was held that the condition applied only to the current year. *666] *Abbott, C. J.*, said that the *words "at all times hereafter" must be construed with reference to the recital in the condition, and to the nature of the appointment there mentioned, which must be learned from the Act of Parliament. In *Pybus v. Gibbs*, 6 E. & B. 902 (E. C. L. R. vol. 88), the bond was held to be at an end because the nature of the office (bailiff of a county court) had been materially altered by the enlargement of the jurisdiction consequent upon later legislation.

Lush was heard in reply.

Lord CAMPBELL, C. J.—I am of opinion that the parties did, in fact, look beyond the current year. But, judicially and technically, I am not at liberty to come to that conclusion. For, according to the authorities, when the office in respect of which the security is given is for a year only, express words are required to make the security extend to more than the year. It seems to me that the words here are not so strong as those in *Oswald v. Mayor, Aldermen, and Burgesses, of Berwick-upon-Tweed*, 5 H. L. Ca. 856, or as those in *Mayor of Dartmouth v. Silly*, 7 E. & B. 97 (E. C. L. R. vol. 90), nor stronger than those in *Peppin v. Cooper*, 2 B. & Ald. 431. I should have thought that the words in the last-mentioned case, "at all times thereafter," meant that the security should be in force as long as the officer held the office: but the Court held that this was not so, and that the security continued only during the year of office. I think, therefore, that the words here, "such statutes as might be thereafter passed," apply only to statutes that might be passed during the year of office: it seems to me that this *667] view is not contradicted by the circumstance *that the plural word, "statutes," is used. I think, therefore, that the sureties

are not responsible for anything occurring after the expiration of the current year of office, though they in fact probably acted upon the supposition that the security ran on as long as the party was in office. I must therefore hold the declaration bad.

COLERIDGE, J.—I am of the same opinion. I do not know that I entirely agree with my Lord as to what was probably passing through the minds of the parties when they executed this bond. I incline, from what generally passes on these occasions, to believe that the parties did not think much about the point, but, knowing that the office was annual, gave their security for it as they found it. However, supposing that not to be so, we are clearly not at liberty to resort to such considerations in construing this instrument: we must take its words, and apply the law to them. It is admitted that, *prima facie*, the security would be limited to the time for which the office was appointed; and it lies on the plaintiffs to displace this. And that seems to me just. The obligor knows at the time the extent to which he is bound, and may estimate the liability which will devolve on him during the time: but he cannot know what liability may devolve on him at a distant time. Suppose two different instruments in writing were presented to him, and he were asked, "Will you be surety for one year, or for the whole life of the officer if he continues in office?" would not any man consider that there was a great difference between the two? I think, therefore, the presumption is that the defendant proceeded upon the state of things which he knew to exist; and that was, that the officer was appointed for a year, and was liable to be not appointed for a second year. If that was presented to the mind of the surety, he would execute the bond [*668 with the knowledge that his liability, unless the terms of the instrument were altered, would be over at the end of the year. Few persons undertake such obligations willingly; they are pressed by friends, and do not like to refuse; but the less the risk is, the better they are pleased. Then, what are the words here upon which Mr. *Lush* relies as creating more than the ordinary liability? "Such statutes as might be thereafter passed." No doubt those words may mean "such statutes as may be passed during any time for which the officer shall hereafter be appointed;" but they may mean also "such statutes as may be passed while he holds under the present appointment;" that is, the current year of office: the meaning may be that the surety is willing to take his chance of any change that may occur during the year, and to undertake such contingent liability for that time. Now, if the latter may be the meaning, then I crave in aid the presumption of the greater probability, which I think overpowering. I think, therefore, that judgment should be given for the defendant.

ERLE, J.—Looking at the mere words, I am obliged to come to the same conclusion. The bond relates to an appointment under the statute. On turning to the statute, we see that the appointment is for one year; and the surety says that he will engage for the due performance of the duties as long as that appointment lasts. He might have engaged to be liable during any subsequent appointment; but there are no words going so far. I come to the conclusion very unwillingly; for I cannot help thinking that the defendant meant to be liable as long as Smith should be treasurer.

*669] *CROMPTON, J.—I am of the same opinion. It is important that we should judge by the rules of law, and not by guess. Nothing is better established than that a surety executing such an instrument as this is to be taken as giving security only in respect of the existing office. When there is a reappointment, he has a right to say that the office is not the same. When the bond recites an appointment under the statute, that controls the subsequent words, and shows what the office is for which the obligor becomes responsible. The only question, then, is, whether we here find words altering that meaning; for of course a party may alter it by words. But the words relied upon clearly refer only to changes that may take place in the nature of the duties of the office, not to anything affecting the term for which it is held. In *Peppin v. Cooper*, 2 B. & Ald. 431, the words were really much stronger: the security was for performance of the duty "at all times thereafter." That might be supposed to refer to fresh appointments: but there is nothing like that here. The cases cited by Mr. *Lush* have been properly decided; but they are very different from this. In *Oswald v. Mayor, Aldermen, and Burgesses, of Berwick-upon-Tweed*, 5 H. L. Ca. 856, there are the words "under any annual or other future election:" that was saying plainly that the security was not to be confined to the exercise of the office under the then existing appointment. There were similar words in *Mayor of Dartmouth v. Silly*, 7 E. & B. 97 (E. C. L. R. vol. 90). We could not give such effect to the words in this condition without breaking in upon established rules. We need not decide on the pleas.

Judgment for defendant

*670] *CUNARD, BRETT, and AUSTEN, v. HYDE. June 8.

The Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107), enacts (sects. 170, 171, 172) that, before any clearing officer permits a ship wholly or partly laden with timber to clear out from any British port in North America or Honduras, after 1st September or before 1st May, he shall ascertain that the whole cargo is below deck, and give the master a certificate to that effect; and the master shall not sail without such certificate, and shall not allow any part of the cargo to be upon deck (except in specified cases of necessity); and, if the master sail without the certificate, or load in the mode forbidden, he shall forfeit 100*l*.

Held that, where a master sails without such certificate, or loads in the mode prohibited, an insurance on the cargo is not thereby vitiated, unless the insured be, at the time of effecting the insurance, privy to the act of the master.

DECLARATION on a policy of insurance at and from Miramichi to port of discharge in the United Kingdom, calling at Cork for orders: not to discharge on the east coast upon any kind of goods and merchandises in the ship called D. B.: beginning the adventure upon the goods and merchandises from the loading thereof aboard the said ship, as above, until the said goods and merchandises should be safely discharged and landed; valued at, on freight and cargo, including dock load, 820*l*. The perils insured against to be of the seas, &c. Averment: That defendant subscribed the policy for 150*l*., and became insurer to that amount. That, after the making of the policy, goods of great value were shipped on board the said ship, to wit, at Miramichi, to be carried as cargo on the voyage in the policy described, for certain freight: and

afterwards the said ship, with the said cargo on board thereof, sailed on the said voyage; and the policy then attached: and afterwards, and whilst proceeding on the said voyage, and during the continuance of the said risk, the said cargo and freight were, by the perils of the seas, and by perils insured against, wholly lost. Averment of interest in plaintiffs and Alexander Fraser, or some or one of them, and that the insurance was for the use, &c., of the person or persons interested. That all conditions necessary, *&c., had been performed. Breach: [*671 non-payment of defendant's subscription.

Plea. That the said policy was made and the said goods shipped on board the said ship after the passing and coming into operation of a certain Act of Parliament made and passed in the 17th year of the reign of Her present Majesty, intituled "An Act to amend and consolidate the Laws relating to the customs of the United Kingdom and of the Isle of Man, and certain Laws relating to trade and navigation and the British possessions:" and that the said goods consisted of timber and wood goods; and that Miramichi, in the said policy mentioned, was and is a British port in North America; and that the said ship with the said goods cleared out and sailed from Miramichi aforesaid after the first day of September in the year of our Lord 1856, and before the first day of May in the year of our Lord 1857, to wit, on the 14th day of September in the year of our Lord 1856; and that, before and at the time of the said ship so sailing as hereinbefore mentioned, the whole of the said cargo was not below deck; but, on the contrary thereof, part of the said cargo was loaded, and remained and was, above and upon the deck of the said ship, contrary to the statute in that behalf made and provided: and that, at the time of the said ship so sailing as aforesaid, the master of the said ship had not obtained from the clearing officer any certificate that the whole of the cargo of such ship was below deck, contrary to the statute in that behalf made and provided: as the person or persons interested in the said cargo and freight well knew, before and at the time of loading of the said cargo and of the said ship so sailing as aforesaid: wherefore the defendant says that the said voyage was and is wholly illegal.

Demurrer. Joinder.

**Blackburn*, for the plaintiffs.—The plea is founded upon The Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107. By [*672 sect. 170: "Before any clearing officer permits any ship, wholly or in part laden with timber or wood goods, to clear out from any British port in North America or in the settlement of Honduras for any port in the United Kingdom, at any time after the first day of September or before the first day of May in any year, he shall ascertain that the whole of the cargo of such ship is below deck, and shall give the master of such ship a certificate to that effect; and no master of any ship so laden shall sail from any of the ports aforesaid for any port of the United Kingdom, at any such time as aforesaid, until he has obtained such certificate from the clearing officer." By sect. 171: "No master of any ship in respect of which such certificate as aforesaid has been obtained shall place, or permit or cause to be placed or remain, upon or above the deck of such ship, any part of the cargo thereof, until such ship has arrived at the port of her destination: provided always, that if the master of any such ship consider that it is necessary, in consequence of the spring-

ing a leak or of other damage received or apprehended during the voyage, to remove any portion of the cargo upon deck, he may remove or cause to be removed upon the deck of such ship so much of the cargo, and may permit the same to remain there for such time, as he considers expedient; provided also, that the store spars or other articles necessary for the ship's use shall not be taken to be the cargo for the purposes of this Act." By sect. 172: "If any master of any ship for which such certificate as aforesaid is required sails or attempts to sail without *673] having obtained such certificate, or places or permits, *or causes to be placed or to remain or be, upon or above the deck of such ship, any part of the cargo thereof, except in the cases in which the same is not hereby forbidden, he shall for every offence forfeit and pay any sum not exceeding 100*l*." The Legislature has, no doubt, here made provisions with the view of preventing the loading of timber in the manner described in the plea. They might have done this by declaring that every voyage where the provisions were not observed should be to all purposes illegal: but they have only prescribed duties to the master, and imposed upon him a penalty for his default in such duties. He alone would be cognisant of the performance or non-performance: there is no appearance of an intention to subject the shippers to the consequences of an illegal adventure whenever the master, without their privity, has stowed a single log of wood improperly. In the same way, in the original Customs Act, 13 & 14 C. 2, c. 11, the duties relating to clearance, prescribed in sect. 3, are imposed on the captain, master, &c., "or any other person or persons taking charge" of the ship; and the penalties are imposed on such persons. A clearance violating that statute does not make the voyage illegal, so as to defeat the insurance: *Atkinson v. Abbott*, 11 East 135,(a) where Lord Ellenborough refers to *Planché v. Fletcher*, 1 Doug. 251, as a decision on the same statute, though the report of the latter case does not mention the statute. As the Legislature, when The Customs Consolidation Act, 1853, was before them, were necessarily cognisant of the interpretation put on the corresponding clauses in the former Act, they must have meant the same *674] thing. It is held that an insurance on goods forming part of a homeward cargo is not vitiated by the fact that other part of the cargo consists of goods which cannot be legally imported: *Pieschell v. Allnutt*, 4 Taun. 792: the illegality there, as here, was merely collateral. [Lord CAMPBELL, C. J.—It will be argued that this was an illegality to which the consignee was a party.] The plea stops far short of that: it avers only that the parties interested knew that the captain was sailing without a certificate; but it does not show that they had any means of preventing this. [CROMPTON, J.—Why could they not have remonstrated?] Consistently with the plea they may have done so, informing the master that he would be held liable. The knowledge of a murder is consistent with perfect innocence; the party murdered commonly has such knowledge. It is not even alleged that the goods belonged to the consignee. [Lord CAMPBELL, C. J.—It does seem that the averment as to knowledge ought to be of knowledge at the time of the insurance.] Even that would have been insufficient: the policy might have been made abroad by an agent who, previously to making it, had communicated the information to the consignees, and such infor-

(a) See p. 141. S. C. (not S. P.), 1 Campb. 535.

mation might have reached them just before the moment at which the policy was executed, without giving them the means of interference. The general principle, however, seems to be well laid down in Phillips's Treatise on the Law of Insurance, ch. III. s. II. § 221 (vol. 1, p. 136, 3d ed. Boston): "A contravention of law, though it have relation to the subject of the risk, still will not affect the insurance if it be remote and distinct from the contract, or only collateral and concomitant with it, or incidental, or *merely precedent or subsequent, and not [*675 constituting a part of it or embracing and imbuing its stipulations. Thus it is not a good objection against an insurance on goods, that they were purchased with the proceeds of a former cargo exported in contravention of law. Kenyon, C. J.:(a) 'If this objection were well founded, in deciding on a claim made on a policy of insurance, it would be necessary to examine the past conduct of the assured, to see whether they had illegally acquired the funds with which the goods were purchased. We cannot enter into considerations of that kind; we must confine ourselves to the immediate transaction before us.' So, where the master in the course of the voyage took on board a smuggled chain cable, though he had intended so to do at the time of sailing, Mr. Justice Story said it 'was a collateral act, no more touching the legality of the voyage than if there had been taken on board some illegal ship stores,' and accordingly held that the policy on the ship was not thereby defeated. So not stowing water below deck, as required by a statute, or not taking on board a pilot where a forfeiture is incurred thereby, does not render the voyage illegal." The American statutable regulation, last referred to, appears to be very analogous to those contained in the clauses now before the Court.

Honyman, contra.—If the voyage be illegal, it will follow that the insurance, being an indemnity for doing an illegal act, is illegal. Now, though the owner of the cargo be not liable criminally for the acts of the master, *he is subject to all civil liabilities resulting from [*676 such acts. The object of the clauses in question was, as in the previous statute 3 & 4 Vict. c. 36, to prohibit a dangerous mode of stowing. The act here done was in violation of a legal prohibition, and, being done with the knowledge of the insured, made the whole transaction illegal as to them.

Blackburn was not called on to reply.

Lord CAMPBELL, C. J.—It is quite clear that the insured cannot be liable to lose the benefit of the insurance on account of the misconduct of the master, unless they were privy to and cognisant of such misconduct at the time when the insurance was effected. This I should have said, even if the statute had contained a positive prohibition, instead of merely imposing a penalty. The object of the enactment was to protect human life and property in the case of goods shipped at the time of the year mentioned in the clauses. It would be monstrous injustice to say that the owners of the goods are to lose their insurance wherever the master violates these regulations; such was not the object of the Legislature. If anything illegal were contemplated by the owners, it would be another question: without that, we cannot hold the contract of insurance void. Mr. *Honyman* therefore must rely, as indeed he does, on the averment of the knowledge by the consignees. But it

(a) The reference is to the judgment of Lord Kenyon, C. J., in *Bird v. Appleton*, 8 T. R. 566.

appears only that their knowledge existed at the time of the loading, which might be after the policy had been effected. It is quite consistent with the averments in this plea, that the insured, when they heard of the mode of loading, were greatly displeased.

*677] *COLERIDGE, J.—It is quite enough for the decision of this case, that the Act does not make the voyage illegal, so as to vitiate the insurance with respect to innocent persons. The Legislature, as Mr. *Blackburn* says, might have done so; but there would have been great hardship in that. All that the Legislature has done is to make the act illegal on the part of the master. If parties know of such act, and, intending that it should be done, effect an insurance, they cannot recover. But there is nothing of that sort here. The plea does not show that the insured knew of the master's act, in the sense of consenting to it and wishing it to be done.

ERLE, J.—The statute prohibits loading in a particular way in certain times, and imposes a penalty on the master if he does that. No one is affected, except the master and persons acting with him.

CROMPTON, J.—For the present purpose, it is sufficient to say that it does not appear that there was any privity between the insured and the master.

Judgment for the plaintiffs.

*678] *The QUEEN v. The Inhabitants of FORDINGBRIDGE.
June 5.(a)

To prove a settlement by apprenticeship, evidence was given that proper search had been made for an indenture, but in vain; and a person was called who deposed that, more than sixty years back, he worked with the same master as the pauper, and always believed him to be apprenticed to that master; that the pauper was instructed there by a journeyman, and lodged and boarded in the house, with two others who were apprentices.

Held, that this was evidence from which a settlement by apprenticeship, under an indenture, might be presumed.

ON appeal against an order for the removal of William Duell and family from the parish of Fordingbridge, in Hampshire, to the parish of St. Thomas, New Sarum, Wiltshire, the Sessions quashed the order, subject to the opinion of this Court on a case, in substance as follows.

The only material ground of removal was: "That the pauper, W. Duell, and his wife and six children, are last legally settled in the parish of St. Thomas; for that he, the said W. Duell, is the legitimate son of James Duell, late of," &c.,—"tailor, deceased; and that the said W. Duell derives and now has a settlement in right of his said father in the parish of St. Thomas, in this, to wit, that, in or about the years 1791 and 1792, the said J. Duell, the father, was then an in-door apprentice to one Mr. Brownjohn, a tailor, residing in the parish of St. Thomas; that the said J. Duell served the said Mr. Brownjohn in his dwelling-house in the same parish of St. Thomas during his apprenticeship, that is to say for the space of forty days and upwards; that the said W. Duell, the pauper, derives a settlement from his father in respect of the said apprenticeship."

The fourth ground of appeal was: "That the said J. Duell was never

(*) The report of this case has been accidentally misplaced.

bound apprentice to the said Mr. Brownjohn by any indenture of apprenticeship."

*The only question in dispute at the trial of the appeal arose [*679 upon the fourth ground of appeal.

In order to prove the apprenticeship, Andrew Geary was called by the respondents, and deposed as follows: "I am ninety years of age. In the years 1791 and 1792 I worked for Mr. Brownjohn; he lived in the Oatmeal Row, in the parish of St. Thomas, New Sarum. J. Duell worked there at the time. He was a boy. I supposed him to be an apprentice. He worked under a journeyman who was there, and was instructed by the journeyman. He resided and lodged in the house there. He lived with his master until he was out of his time. He took his meals with the family. There were two others who also lived and boarded in the house as apprentices, and were instructed in the art and mystery of a tailor. J. Duell was the oldest of the three. The names of the others were Lawford and Moody. The journeymen did not board in the house, but took their meals in their own houses. When J. Duell did his work to the satisfaction of his master, I have known his master to give him a shilling. I have seen his master praise his work." Upon cross-examination, the witness said: "I first went to Brownjohn in 1791. I worked there for a twelvemonth. On the second occasion I was there for half a year; at that time J. Duell worked there. I took my meals at home; so did all the men except the apprentices. Moody and Lawford were dead." On re-examination, the witness said: "When I left Mr. Brownjohn's I worked at a shop close by, in Salisbury Close. I know the said J. Duell worked at the said Mr. Brownjohn's all the remainder of his time. I sometimes saw J. Duell when I worked in the close."

*Sarah Duell was then called, and, being sworn, deposed as follows: "I am the widow of J. Duell; he died three years ago. [*680 I am the mother of W. Duell the pauper. I was married nearly sixty years ago. My husband was the son of James Duell, of Hall, in Hampshire. The pauper is my son, born in lawful wedlock. My husband was a tailor. I knew him six months before we married. I looked among his papers for an indenture, but could not find it."

It was then proposed to examine her further, as to a conversation with her husband with reference to an indenture of apprenticeship. This was objected to by the counsel for the appellants: but, after discussion, the Court decided upon allowing the examination to proceed, saving the right to the appellant's counsel to renew their objection when the examination should be concluded. And the witness then stated: "My husband and I have often had conversation on the subject of his apprenticeship; he has frequently spoken of his indenture of apprenticeship; I have heard him say repeatedly that, when he and his master changed indentures, his master gave him half a crown to drink his health; he said he delivered his indenture to his father, and never saw it afterwards."

It was admitted by the appellants that full search had been made for an indenture, but that none had been found. And the appellants' counsel then renewed their objection, and contended that the evidence of Sarah Duell last stated was not admissible; and that, without that, there was no evidence of the apprenticeship of the said J. Duell. The respondents' counsel contended that the said evidence was admissible;

*681] and, if it was not, that *without it there was evidence of such apprenticeship. The Quarter Sessions thought that the evidence was not admissible, and that, without it, there was not any evidence of the apprenticeship: and they quashed the order, subject to the opinion of the Court as hereunder stated.

If the Court should be of opinion that the said evidence of Sarah Duell was admissible in proof of the existence of an indenture of apprenticeship, or that without the said evidence there was sufficient evidence to establish an apprenticeship as alleged in the said grounds of removal, the order of the Sessions was to be quashed and the order of removal confirmed. But, if the Court should be of opinion that the said evidence was not admissible as aforesaid, and that without the said evidence there was not sufficient evidence to establish an apprenticeship as aforesaid, then the order of Sessions was to be confirmed and the order of removal quashed.

Monk and C. B. Russell, in support of the order of Sessions.—First, as to the evidence of Sarah Duell. The conversation between her and her husband, now deceased, is inadmissible to prove the existence of an indenture. Where the existence of a document is proved aliunde, hearsay evidence of the person having the custody of the document has been admitted, for the purpose of showing where search ought to be made. But such evidence has never been admitted to prove the express fact of the existence of the document. In *Rex v. Morton*, 4 M. & S. 48 (E. C. L. R. vol. 30), hearsay evidence as to the destruction of an indenture *682] was admitted; but it was admitted, not for the purpose of *proving the fact of there having once been an indenture, but, that being proved aliunde, of showing that sufficient search had been made. And, in *Rex v. Rawden*, 2 A. & E. 156 (E. C. L. R. vol. 29), similar evidence was rejected, on the ground that there was no proof aliunde that the indenture, the loss of which it was sought to prove, had ever been in the custody of the person whose statement with respect to it was tendered. In *Rex v. Kenilworth*, 7 Q. B. 642 (E. C. L. R. vol. 53), the hearsay evidence was that of the party having the custody of the document, and was admitted only to show that proper search had been made.

Next, the remaining evidence is not sufficient to establish the fact of an apprenticeship. To hold that it is would be to hold that the existence of an instrument may be presumed from circumstances. [Lord CAMPBELL, C. J.—Marriage, the most important of all contracts, is often presumed from circumstances.] Here, not only a contract, but a contract by deed, must be presumed. [Lord CAMPBELL, C. J.—If we presume a contract at all, we may presume that all proper requisites to it have been performed.] No doubt: but a contract cannot be presumed at all when it is necessarily a contract by deed. *Rex v. St. Marylebone*, 4 D. & R. 475 (E. C. L. R. vol. 16) may be relied on by the respondents. But that case is contradicted by the later case of *Rex v. Rawden*. [Lord CAMPBELL, C. J.—No: there the question was as to the admissibility of certain hearsay evidence only.] In *Rex v. St. Marylebone*, the general evidence was much stronger than here; and Bayley, J., in *683] giving judgment, relies principally on a circumstance which is wanting in the present *case, namely, subsequent relief of the

pauper's wife by the parish in which, if there had been an apprenticeship at all, he would have gained a settlement. The question of presumption, moreover, being a question of fact, is for the Sessions; and the Court will not interfere with their decision. [Lord CAMPBELL, C. J.—We have to say whether they were or were not *bound* to presume an indenture of apprenticeship, upon the facts stated in the case.] They were certainly not bound to do so: the evidence is not even sufficient to prove an apprenticeship of any kind, still less a regular apprenticeship by indenture. It is quite consistent with the pauper having been nothing more than a menial servant. [ERLE, J.—I think not.—But, if it were, it might still be evidence to show an apprenticeship, though not conclusive evidence. Partnership is often presumed from circumstances which are nevertheless consistent with other relations, such as that of principal and agent, between the parties.]

W. M. Cooke and Yonge, contra, were not called upon.

Lord CAMPBELL, C. J.—We are asked to say whether there was reasonable evidence from which the Sessions could infer the existence of an indenture of apprenticeship. I am of opinion that there was, upon the principle laid down by Bayley, J., in *Rex v. St. Marylebone*, 4 D. & R. 475 (E. C. L. R. vol. 16). "The general rule applicable to the doctrine of presumption is, that we are to presume that which reasonably accounts for the actual existing state of things." Now here is a state of things which can reasonably be accounted for by supposing the existence, at one *time, of an indenture of apprenticeship, [*684 and not by any other supposition. There is, certainly, a bare possibility the other way; but no reasonable man could doubt, on such evidence as this, that there had been an indenture. In *Rex v. St. Marylebone*, two most learned Judges agree that the existence of such a document may be presumed from facts: and in that case, as in the present, there was no evidence aliunde of the existence of the indenture. That case, which appears to be very distinctly reported, is an express authority upon the question before us; and there is no case to the contrary. In *Rex v. Morton*, 4 M. & S. 48 (E. C. L. R. vol. 30), and *Rex v. Rawden*, 2 A. & E. 156 (E. C. L. R. vol. 29), the question was as to the admissibility of certain declarations given in hearsay evidence. The circumstances here leave no doubt whatever on my mind that an indenture of apprenticeship was executed, under which a settlement was gained.

(COLERIDGE, J., was absent.)

ERLE, J.—I am of the same opinion. The question here is whether, upon this evidence, a reasonable man would infer that the man had been bound apprentice? I know of no rule of law requiring technical proof of the existence of an indenture of apprenticeship, or of any other deed, or which prohibits the presumption of the existence of the deed from circumstances. In the present case a long time has elapsed since it could have been executed; and it is scarcely likely that it could be found; and proper search appears to have been made for it. Then we have the evidence of a companion of the man who worked with him; and his statements go *most strongly to show an apprenticeship. The [*685 evidence therefore, on the whole, is quite sufficient to warrant the inference that there was a regular indenture of apprenticeship. The relations of landlord and tenant, of partnership, of marriages, are fre-

quently presumed from the conduct of the parties being consistent with that state of things, and more consistent with that than with any other. Upon that principle I think the relation of master and apprentice may fairly be presumed here.

(CROMPTON, J., was absent.)

Order of Sessions quashed.

HODGSON v. JOHNSON. *June 9.*

By agreement, not in writing, between plaintiff and defendant, it was agreed that plaintiff should take possession of a brickyard, which defendant was occupying as tenant, and take the plant and bricks there at a valuation; and that defendant should pay up all rent then due, and endeavour to induce the landlord to accept plaintiff as tenant.

Plaintiff took possession of the brickyard, and gave defendant a warrant of attorney as security for payment of the sum at which the bricks and plant were valued. A distress was afterwards put in upon the premises, and the plant and bricks sold, for rent due from defendant before the agreement; and plaintiff was turned out of possession by the landlord.

In an action by plaintiff against defendant, for the breach of the agreement to pay up the rent:

Held, that the contract and consideration were each single and entire; that the contract, taken in its entirety, was a contract for the sale of an interest in lands, and, not being in writing, was voidable under sect. 4 of the Statute of Frauds; and that plaintiff, therefore, could not sever and sue upon that part which related to the payment of the rent.

THE declaration (as amended, as after stated) alleged that, before and at the time of the making of the promise by defendant hereinafter mentioned, defendant held certain premises with the appurtenances, as tenant thereof to one H. T., at a certain yearly rent payable by defendant to the said H. T., and was possessed of certain plant, goods and *686] chattels in and upon the said premises, *and was desirous of selling and disposing of the said plant, goods and chattels to the plaintiff, and of procuring the plaintiff to be accepted by the said H. T. as tenant of the said premises; and thereupon afterwards, to wit, on, &c., in consideration that the plaintiff would purchase the said plant, goods and chattels at a valuation, and take possession of the said premises with the appurtenances, defendant promised plaintiff that he would endeavour to procure the plaintiff to be accepted by the said H. T. as tenant of the premises, and would pay up, satisfy, and discharge all rent then due or payable from him to the said H. T. in respect of the said premises: that plaintiff, relying upon the said promise of defendant, did purchase the said plant, goods and chattels of defendant at a valuation as aforesaid, and took possession of the said premises with the appurtenances: yet defendant, disregarding his said promise, did not pay up, satisfy, and discharge all rent due or payable from him to the said H. T. in respect of the said premises, but wholly neglected so to do; whereby certain goods and chattels of plaintiff, in and upon the said premises, were afterwards distrained by the said H. T. for rent which defendant agreed to pay as aforesaid.

Counts for money paid, money had and received, and on accounts stated.

Pleas: 1. Non assumpsit. 2. To the second, third, and fourth counts: Never indebted. 3. To the same: Set-off. Issues on all the pleas.

At the trial, before Byles, J., at the last Assizes for Lancaster, it

appeared, from the evidence of the plaintiff, that, in April, 1857, he agreed, at the solicitation of the defendant, to take possession of a brick-yard, which the defendant was then occupying as tenant, and to take the *plant and bricks upon it at a valuation, and give the defend- [*687
ant a warrant of attorney for the sum at which they were valued. The defendant agreed to settle with the landlord for all rent then due, and to endeavour to induce him to accept the plaintiff as tenant. The plaintiff took possession of the premises, and worked the plant, and executed the warrant of attorney as agreed. Some months afterwards, a distress was put in by the landlord for three years' rent due from the defendant. The plant and bricks were sold; and the plaintiff was turned out of possession.

It was objected, on behalf of the defendant, that the agreement was for the sale of an interest in lands, and that, not being in writing, it was voidable under sect. 4 of the Statute of Frauds, 29 C. 2, c. 3. The learned Judge directed a verdict for the plaintiff, with leave to the defendant to move to enter a nonsuit: the plaintiff to be at liberty to amend his declaration; which was amended accordingly, as above set out.

Monk, in last Easter Term, obtained a rule *Nisi* accordingly.

Overend and *J. A. Russell* now showed cause.—The agreement, as it now stands, upon the declaration as amended, and in which shape it was clearly proved at the trial, is an agreement by the defendant to sell the plant and bricks upon the land; and, in addition, to use his influence with the landlord to procure, if possible, his acceptance of the plaintiff as tenant in the place of the defendant. That is not an agreement for the sale of an interest in lands, within sect. 4 of the Statute of Frauds.

It passes no interest in the land. [Lord CAMPBELL, C. J.— [*688
*The defendant's interest, such as it was, was to pass, under the agreement, to the plaintiff.] No interest actually passed; nor could any pass unless and until the landlord accepted the plaintiff as tenant. The agreement, as far as it relates to the land at all, gave him, absolutely, only the possession of the premises and plant, and the right to work the latter. And, even if that part of the agreement be an agreement for the sale of an interest in land, it has been executed; and therefore the plaintiff may sue upon the other part of the contract, namely, the promise to pay up all the rent due: *Green v. Saddington*, 7 E. & B. 503 (E. C. L. R. vol. 90). [CROMPTON, J.—Can the two parts of the contract be severed, as in *Green v. Saddington*?] They can. In *Cocking v. Ward*, 1 Com. B. 858 (E. C. L. R. vol. 50), an agreement very similar to this, the promise of the transferee of the tenancy to pay the purchase money was held to be severable from the agreement for such transfer. [CROMPTON, J.—The promise there was distinct and collateral.] In *Price v. Leyburn, Gow*. 109, cited in *Cocking v. Ward*, where the agreement, not in writing, stipulated that the plaintiffs should be substituted as tenant in the place of the defendant, and that the defendant should reimburse the plaintiffs for any arrears of rent due from the defendant and paid by the plaintiffs, it was held that the plaintiffs might sever, and sue upon, the latter part of the contract, inasmuch as that part did not relate to the sale of an interest in lands. And *Dallas*, C. J., appears to have suggested, as an additional reason, that the first

*689] part of the contract had been executed. In that case *the agreement sued upon was not collateral. [CROMPTON, J.—*Kelly v. Webster*, 12 C. B. 283 (E. C. L. R. vol. 74), is a strong authority against you.]

Monk and C. Milward, *contra*, were not called upon.

Lord CAMPBELL, C. J.—I am of opinion that this action is not maintainable; and that the agreement is voidable, under sect. 4 of the Statute of Frauds, as being for the sale of an interest in lands, and not being in writing. I think that the declaration, as amended, sets up a contract of that kind, and that the contract, as set up, was proved. The defendant was to give up possession of the premises; and, if he had refused to do so, an action would have lain against him by the plaintiff. There is but one consideration for the whole contract; and, though part of that one contract may have been performed, the consideration remains entire, and therefore such part performance will not enable the plaintiff to sue in respect of that part of the contract which remains unperformed. In an action upon that, he would have to prove the promise by proving the whole of the original agreement; and that agreement, as a whole, is voidable under the Statute of Frauds. Where a contract consists of two collateral agreements, one only of which relates to an interest in land, then, if that part of the contract has been executed, the fact of the whole contract not being in writing will not preclude an action on the other part, founded on a promise to be performed after such execution. That was decided in *Green v. Saddington*, 7 E. & B. 503 (E. C. L. R. *690] vol. 90). But one contract, founded *upon one consideration, cannot be bisected so as to make a new contract and a new consideration out of one-half.

(COLERIDGE, J., had left the Court.)

ERLE, J.—It seems to me that the promise relied on here is implicated with the promise which relates to the sale of an interest in lands. There may, no doubt, be more than one distinct promise in a single agreement: but here the promises are not independent.

CROMPTON, J.—Here is only one contract and one consideration. The contract, therefore, must be sued upon as a whole; and, taken as a whole, it relates to the sale of an interest in lands, and is voidable under the Statute of Frauds. I myself entertained doubts as to the decision in *Green v. Saddington*. But, at all events, unless the contract consists, as in that case, of two distinct and independent agreements, it is not severable.

Rule absolute to enter a nonsuit.

*691] *ROBERT LUSCOMBE, Appellant, *v.* The Local Board of Health for the Borough of PLYMOUTH, Respondents.
June 9.

ELIZABETH SHORTLAND, Appellant, *v.* The Same, Respondents.

ALEXANDER PONTEY, Appellant, *v.* The Same, Respondents.

The proviso in sect. 88 of The Public Health Act, 1848 (11 & 12 Vict. c. 63), which exempts from General or Special District Rates under the Act any kind of property in the district which, before the Act, had by any local Act been exempted from rating in respect of all or

any of the purposes for which General or Special District Rates may be made under The Public Health Act, 1848, in respect of the same purpose and to the same extent, applies only where the exemption in the local Act was in respect of the kind of property, and not where it was only in respect of its locality.

A local Act (5 G. 4, c. xxii.) described the property rateable to be gardens, tenements, and hereditaments, adjoining to or upon streets, &c., built or thereafter to be built, within the populous or town part of the borough of P., or at no more than a certain distance from streets, &c. Held that this was not an exemption in respect of kind, and that the exempting proviso of sect. 88 of the Public Health Act, 1848, was therefore inapplicable to gardens, tenements, &c., though without the limit prescribed in the local Act. Per Lord Campbell, C. J., Wightman and Crompton, Js.; dissentiente Erle, J.

ON 2d July, 1856, a General District Rate was made by The Local Board of Health for the borough of Plymouth, for defraying such expenses as are by The Public Health Act, 1848 (11 & 12 Vict. c. 63), charged upon that rate, and such other expenses of carrying into execution the said Act in the said district as are not provided for by any other rate or chargeable upon The District Fund, after the rate of 1s. 8d. in the pound, upon the several occupiers and other parties liable by law to be assessed thereto. The three appellants were severally assessed to the said General District Rate, and each gave notice of appeal: and, by consent, and the *order of Erle, J., it was agreed to state the [*692 facts in special cases for the opinion of this Court; and that judgments, in conformity with the decisions, and for such costs as the Court should adjudge, might be entered at the Sessions, &c.

The introductory part of the first two cases was the same, and was substantially as follows.

By stat. 5 G. 4, c. xxii., (a) Commissioners were appointed for carrying the Act into execution; and powers vested in them for that purpose.

Sect. 105 was as follows. "And for raising money for answering and defraying the expenses attending the obtaining of this Act, and carrying into execution the several purposes thereof, be it further enacted, that it shall be lawful for the said Commissioners or any seven or more of them, and they are hereby authorized and empowered, when and so often as they shall think necessary, at any meeting or meetings to be holden for that purpose, to order and direct a rate or rates, assessment or assessments, to be made, charged, or levied upon the tenant or occupier, not exceeding two shillings in the pound in any one year, on the full annual rent or value of all houses, shops, warehouses, cellars, vaults, wharfs, quays, manufactories, founderies, mills, stables, coachhouses, brewhouses, markets, and other buildings and erections already built, erected, or made, or which shall hereafter be built, erected, or made, or situate, standing, and being in the said town and borough of Plymouth (within certain limits as herein mentioned), *and upon the several gardens, [*693 curtilages, yards, and other conveniences thereto adjoining or belonging, and upon all gardens, tenements, and hereditaments adjoining to or upon any of the streets, lanes, roads, passages, or other public places which are already made or built, or which shall hereafter be made or built, within the populous or town part of the said borough, or situate so contiguous to some street within the populous or town part of the said borough that there be no greater distance than one hundred feet from some street within the populous or town part of the said borough

(a) Local and personal, public: "For better paving, lighting, cleansing, watching, and improving the town and borough of Plymouth in the county of Devon; and for regulating the police thereof; and for removing and preventing nuisances and annoyances therein."

to the nearest of such houses or buildings, or the gardens, curtilages, or yards thereunto adjoining and belonging, nor from such last-mentioned houses or buildings, gardens, curtilages, or yards, to such as shall be next succeeding, and so on from one rateable house or building, or garden, curtilage, or yard thereunto adjoining and belonging, to the next or nearest, in whatsoever direction the same may be, or how far soever the same may extend, in the said borough; and such rate or rates, assessment or assessments, shall be made at any time after the passing of this Act, and shall be assessed and raised by such half-yearly, quarterly, or other payments as the said Commissioners shall think fit and direct, and shall be paid to and levied and collected by any collector or collectors to be appointed by the said Commissioners, and shall, when collected, be paid to the treasurer or treasurers for the time being of the said Commissioners; such annual rent or value to be from time to time settled, ascertained, and fixed in such manner as the said Commissioners shall direct or appoint." A copy of this Act accompanied the case.

On 3d November, 1853, The General Board of Health, by their provisional order, which was duly confirmed by *Act of Parliament, *694] 17 & 18 Vict. c. 53, directed that The Public Health Act, 1848, except sect. 50, should apply to the area comprised within the boundaries of the borough of Plymouth. And various sections (including sect. 105) of the local Act were by the said order repealed.

It is by the said order provided that the Mayor, aldermen, and burgesses of the said borough should be, by the town council of the said borough, the Local Board of Health under the said Public Health Act.

ROBERT LUSCOMBE, Appellant, v. The Local Board of Health for the Borough of PLYMOUTH, Respondents.

In this case, the statement, after the introductory part above set forth, was in substance as follows.

The Commissioners, acting under the local Act, during the continuance of their powers, levied rates, from time to time, for the purposes for which they were authorized so to do.

Before and at the time of the making of the rate appealed against, the appellant was the occupier of a field situate within the borough of Plymouth, and within the district of The Local Board of Health. Such field was not, however, situate, adjoining to, or upon, any street, lane, road, passage, or other public place within the populous or town part of the borough of Plymouth; nor within the limits defined by the section of the local Act before set out. And no rate under the said local Act was ever paid in respect of the said field. And the appellant contends that the field was not rateable under the local Act. The respondents contend that it was. At the time aforesaid, the appellant was also *695] the occupier *of a market garden, situate within the said borough, and within the district of the said Board of Health; but which market garden was not a garden adjoining or belonging to any house or building; nor was the same situate, and adjoining to, or upon, any street, lane, yard, passage, or public place, within the populous or town part of the said borough, nor otherwise within the limits defined by the section of the local Act before set out. And no rate under the said local Act was ever paid in respect of the said garden. And the appel-

lant contends that the said garden was not rateable under the local Act. The respondents contend that it was.

The appellant, as the occupier of the field and market garden before mentioned, is rated in respect thereof by the said Local Board, in the rate appealed against, in the proportion of one-fourth of the net annual value of such field and market garden, respectively, under the provisions of sect. 88 of The Public Health Act, 1848.

The entry in the rate is as follows.

Occupier.	Owner.	Description of property rated.
Robert Luscombe.	Tink.	Field and Garden.

The appellant contends that the field and market garden, for which he is now rated, were not, nor was either of them, rateable under the local Act; and that therefore they are also respectively exempted from rateability by the last proviso in sect. 88 of stat. 11 & 12 Vict. c. 63. The respondents contend that neither the field or garden, which were the subject of the rate against which notice of appeal was given, were a kind *of property which, within the meaning of sect. 88 of The Public Health Act, 1848, had been exempted from rating by any [*696 local Act before the passing of The Public Health Act, 1848.

The rate is made for a purpose for which the property, if rateable under the local Act, might have been rated under the provisions thereof.

If the Court shall be of opinion that the said field and garden were respectively liable to be assessed to the rate against which notice of appeal has been given, the rate is to be confirmed. But, if the Court shall be of opinion that either the field or garden was not liable to be so assessed, then the said rate is to be amended by striking out the assessment on the appellant in accordance with the judgment of the Court.

ELIZABETH SHORTLAND, Appellant, v. The Local Board of Health for the Borough of PLYMOUTH, Respondents.

In this case, the statement, after the introductory part above set forth, was in substance as follows.

Before and at the time of making the rate appealed against, the appellant was the occupier of a house, and garden attached thereto, within the borough of Plymouth, but not within the populous or town part of the borough. The house and garden are not within 100 feet of any property rateable under the local Act except the line of The South Devon Railway Company, which paid rates under the local Act since its completion.

There is no station or building of the railway within 100 feet of the house or garden: and the appellant *contends that the line of [*697 railway was not rateable under the local Act. The respondents contend that it was.

The premises in question are situated close to the eastern boundary of the borough. And the communication between the said premises and

populous or town part of the borough is by means of two roads: the one turnpike, and always repaired by the trustees of the same until the 9th instant (January, 1858), when handed over to the Local Board of Health; and the other a parish road; both communicating with the appellant's property. The footway attached to the turnpike-road has been always repaired by the Local Board of Health and their predecessors in office; and the parish-road has been repaired by the way-wardens until 1854, and since that period by The Local Board of Health. At the present time both roads and footways are repaired by that Board. The nearest gas-lamp is at present 700 yards from these premises; but The Local Board of Health are authorized by their Act to place gas-lamps in any nearer position on the turnpike-road which leads to the premises.

The entry in the rate is as follows.

No.	Occupier.	Owner.	Description of property rated.
1205	Elizabeth Shortland.	Elizabeth Shortland.	House and Lawn.

The appellant contends that the premises, for which she is now rated, were not, nor any part of them, rateable under the local Act: and that therefore, and inasmuch as the same premises have as yet derived no *698] direct benefit from the works done by direction of The Local Board of Health, such premises are also exempt from rateability under the proviso in section 88 of stat. 11 & 12 Vict. c. 63.

The respondents contend that neither under The Public Health Act, 1848, nor under stat. 5 G. 4, c. xxii., is any exemption from rating conferred upon the appellant in respect of the property which is the subject of the rate against which notice of appeal has been given.

The rate is made for a purpose for which the property, if rateable under the local Act, might have been rated under the provisions thereof.

If the Court shall be of opinion that the premises in respect of which the appellant is rated were liable to be assessed to the said rate, the said rate is to be confirmed. But, if the Court shall be of opinion that the said premises were not liable to be so assessed, then the said rate is to be amended by striking out the said assessment on the appellant in respect of the said premises.

ALEXANDER PONTEY, Appellant, v. The Local Board of Health for the Borough of PLYMOUTH, Respondents.

This case commenced with an introductory part corresponding with that already set forth down to and including the recital of sect. 105 of stat. 5 G. 4, c. xxii. (See p. 693). It then proceeded as follows.

The Commissioners, acting under the said Act, from time to time levied rates for the purposes for which they were authorized so to do: but, until 1848, the Commissioners did not assess to the rates fields, whether pasture, arable, or otherwise, lying within the limits mentioned *699] in the Act; but market gardens within the prescribed distance were, at the period hereafter mentioned, rated.

In 1848, however, all fields adjoining streets within the populous or town part of the borough were rated by the Commissioners: and market

gardens within the distance mentioned in sect. 105 of the local Act were also rated. Appeals were entered against the rate by the occupiers of the fields and market gardens so assessed. And, on the appeals coming on to be heard at the Devon Midsummer Sessions, 1849, the Sessions decided that the Commissioners had no power to assess the fields appealed against, or market gardens, which were not adjoining to any house, to the rate; and the rate was amended accordingly. And, from that time until the borough of Plymouth was brought under the operation of the Public Health Act, 1848, fields within the limits mentioned in the local Act, and market gardens within the same limits not adjoining or belonging to houses or buildings, have not been assessed.

On the 3d November, 1853, The General Board of Health, by their provisional order, which was duly confirmed by stat. 17 & 18 Vict. c. 53, directed that The Public Health Act, 1848, except sect. 50, should apply to the area comprised within the boundaries of the borough of Plymouth. And various sections (including sect. 105) of the local Act were, by the said order, repealed. It is by the said order provided that the Mayor, aldermen, and burgesses of the borough should be, by the council of the borough, The Local Board of Health under the Public Health Act, 1848.

Before and at the time of the making of the rate appealed against, the appellant was the occupier of a pasture field situate within the populous part of the *town and borough of Plymouth, and adjoining [*700 to and upon a street within the populous or town part of the borough, and within the district of The Plymouth Local Board of Health. And he was rated, by the said Board, as such occupier, in respect of such field, in the proportion of one-fourth of the net annual value, under the provisions of sect. 88 of the Public Health Act, 1848.

The entry in the present rate is as follows.

Occupier.	Owner.	Description of property rated.	Name or situation of property rated.
Alexander Pontey.	Richard Mason.	Field. Garden.	Five Field Lane.

Before and at the time of making the rate now appealed against, the appellant was also the occupier of a market garden situate in the populous or town part of the borough, and adjoining to and upon a street within the populous or town part of the borough, but not adjoining a building. The said market garden is within the district of the Plymouth Local Board of Health; and the appellant was rated by the said Board, as such occupier, in respect of such market garden, in the proportion of one-fourth of the net annual value, under the provisions of sect. 88 of The Public Health Act, 1848.

The appellant contends that, under the local Act, the field and market garden in respect of which he is rated were not, nor was either of them, liable to be rated; and that the exemption from rating is preserved by the proviso in sect. 88 of stat. 11 & 12 Vict. c. 63.

The respondents contend that the field and garden rated in this case were not such kinds of property, within *the meaning of the Public Health Act, 1848, as were exempted from rating under [*701 stat. 5 G. 4, c. xxii., s. 105.

The rate is made for a purpose for which the property, if rateable under the local Act, might have been rated under the provisions thereof.

If the Court shall be of opinion that the field and garden were liable to be assessed to the rate against which notice of appeal was given, the said rate is to be confirmed: but if the Court shall be of opinion that either the field or garden is not liable to be so assessed, then the said rate is to be amended by striking out the assessment on the appellant in accordance with the judgment of the Court.

The case was argued in last Easter Term,^(a) by *Coleridge* for the respondents, and *Karslake* for the several appellants. The question in all the cases was, Whether the rating clause in sect. 105 of stat. 5 G. 4, c. xxii., contained an exemption such as to bring the property within the exemption in the last proviso of sect. 88 of The Public Health Act, 1848 (11 & 12 Vict. c. 63). The section last mentioned is as follows.

"And be it enacted, that the said special and general district rates shall be made and levied upon the occupier (except in the cases herein-after provided) of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property ascertained by the rate (if any) for the relief of the poor made next before the making of the respective assessments under this Act; and for the purpose of making any such assessment The Local Board of *702] Health, or any person appointed by *them so to do, may from time to time, at all reasonable times, inspect, take copies of, or make extracts from any rate for the relief of the poor within their district, or any assessments by which the same are made." Penalty upon parties refusing to permit the inspection or the taking of copies, &c. Provision for valuation, where there is no poor-rate. "Provided also, that the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal, or towing-path for the same, or as a railway, constructed under the powers of any Act of Parliament, for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof: provided also, that if within any district or part of a district any kind of property shall before the passing of this Act have been exempted from rating by any local Act, in respect of all or any of the purposes for which general or special district rates may be made under this Act, the same kind of property shall, in respect of the same purposes, and to the same extent within the parts to which the exemption applies, but not further or otherwise, be exempt from assessment to any general or special district rates under this Act."

The following authorities were referred to: *Tait v. Carlisle Local Board of Health*, 2 E. & B. 492 (E. C. L. R. vol. 75); *Guardians of Chelmsford Union v. Chelmsford Local Board of Health*, 2 E. & B. 560, note (E. C. L. R. vol. 75); *Rex v. The Manchester and Salford Waterworks Company*, 1 B. & C. 630 (E. C. L. R. vol. 8); *Regina v. Nevill*, 8 Q. B. 452 (E. C. L. R. vol. 55); *East London Waterworks Company v. Trustees for Mile End Old Town*, 17 Q. B. 512 (E. C. L. R. vol. 83).

*703] The *points urged will sufficiently appear from the judgments delivered by the learned Judges. *Cur. adv. vult.*

On this day, there being a difference of opinion on the Bench, the judgments of the learned Judges were delivered seriatim.

CROMPTON, J., read the judgment of
WIGHTMAN, J.

LUSCOMBE, Appellant, v. The Local Board of Health for the Borough of PLYMOUTH, Respondents.

The question in this case is, Whether the property, in respect of which the appellant is rated, is exempt from rateability within the meaning of the last proviso at the end of the 88th section of stat. 11 & 12 Vict. c. 63, on the ground that, by the 105th section of the local Act, 5 G. 4, c. xxii., the property in question was not rateable to the expenses of carrying that Act into execution for paving, lighting, cleansing, &c., the town of Plymouth.

The property in respect of which the appellant is rated is a field and market garden, and is rated in the proportion of one-fourth only of the net annual value, under the second proviso to the 88th section of stat. 11 & 12 Vict. c. 63, in favour of land used as arable, meadow, or pasture ground only, or as market garden. But it is contended, by the appellant, that it is exempt from rateability altogether, by the last proviso to that section: by which it is provided that, if any kind should, before the passing of that Act, have been exempted from rating by any local Act, the same kind of property should, to the same extent, within the parts to which the exemption applied, be exempt from assessment under stat. 11 & 12 Vict. c. 63. [*704]

The local Act, 5 G. 4, c. xxii. s. 105, does not in terms exempt any kind of property from rateability: but it particularly describes the kind of property that may be rated, and defines the limits within which it must be situate in order to be rateable.

Amongst the different kinds of property rateable are mentioned "all gardens, tenements, and hereditaments adjoining to or upon any of the streets, lanes, roads, passages, or other public places which are already made or built, or which shall hereafter be made or built, within the populous or town part of the said borough, or situate so contiguous to some street within the populous or town part of the said borough that there be no greater distance than one hundred feet from some street within the populous or town part of the said borough."

The property in question did not adjoin or belong to any house or building; nor did it adjoin, nor was it within one hundred feet of, any of the streets, lanes, roads, passages, or other public places, within the populous or town part of the borough; nor had any rate ever been paid in respect of it under the local Act. The respondents, however, contend that the proviso for exemption in the 88th section of stat. 11 & 12 Vict. c. 63, applies only to cases where a certain kind of property is exempted from rateability by some local Act, and not to such a case as the present, where the kind of property is not exempted from rateability by the local Act, but, on the contrary, is expressly included within the description of property rateable, provided it be situate within certain limits, which are, however, subject to frequent alterations. I am of opinion that this is the true construction of the proviso, and that it does not extend to property exempted by some local statute in [*705]

respect of its locality, but only to property exempted in respect of its kind. This was expressly decided in this Court, in the case of *Tait v. Carlisle Local Board of Health*, 2 E. & B. 492 (E. C. L. R. vol. 75). In the present case, all gardens, tenements, and hereditaments are rateable by the local Act, if in certain situations. And, as the words used in describing the kind of property rateable are so large as to include the field and garden in respect of which the appellant is rated, and as I think, in accordance with the case of *Tait v. The Carlisle Local Board of Health*, that the exemption contemplated by the proviso in stat. 11 & 12 Vict. c. 63, is to be determined by the kind of property, and not by its locality, my judgment is for the respondents.

SHORTLAND, Appellant, *v.* The Local Board of Health for the Borough of **PLYMOUTH**, Respondents.

The appellant in this case was rated in respect of a house and lawn within the borough of Plymouth, but not within the populous or town part of the borough, or one hundred feet of any street in such part of the borough. The same points were made in this case as in the case in which *Luscombe* was appellant: and I am of the same opinion as in that case, and upon the same grounds. My judgment, therefore, is for the respondents.

*706] ***PONTEY**, Appellant, *v.* The Local Board of Health for the Borough of **PLYMOUTH**, Respondents.

The appellant in this case was rated in respect of a field and market garden within the borough: and the property was so situate that, if it was of a *kind* that would have been rateable under the local Act, it was admitted to be within the limits. I am, as in the case of *Luscombe*, of opinion that the words "all gardens, tenements, and hereditaments," are so large as necessarily to include the property in question: and my judgment, therefore, in this case also, is for the respondents.

CROMPTON, J.—I entirely concur in the opinion of my brother *Wightman*, which I have read for him.

It seems to me that the proviso in the 88th section of The Public Health Act, 1848, applies to the exemption of a sort and species of property, such as houses, buildings, arable land, meadow, &c., and not to land distinguished by locality or proximity to other buildings or property. The word "*kind*," in the proviso, seems to me to be used in the same sense as that in which it is used in the preceding part of the same section, by which all kinds of property rateable to the poor law rate are made rateable to the rate in question.

It seems to me also that the case is governed by the case of *Tait v. Carlisle Local Board of Health*, 2 E. & B. 492 (E. C. L. R. vol. 75), which I think expressly in point: and certainly, as far as I was concerned in that judgment, my opinion proceeded on grounds directly applicable to the present case.

*707] ***I** think, therefore, that the rate is good, and should be confirmed. And that our judgment in all these cases should be for the respondents.

ERLE, J.—

LUSCOMBE, Appellant, v. The Local Board of Health for the Borough of PLYMOUTH, Respondents.

In this case the question is, whether the field and market garden of the appellant are exempted from rates made for certain specified purposes by The Local Board. The exemption was claimed under the proviso to sect. 88 of The Public Health Act, 1848, 11 & 12 Vict. c. 63, enacting that, "if within any district or part of a district any kind of property shall, before the passing of this Act, have been exempted from rating by any local Act, in respect of all or any of the purposes for which general or special district rates may be made under this Act, the same kind of property shall, in respect of the same purposes, and to the same extent within the parts to which the exemption applies, but not further or otherwise, be exempt from assessment to any general or special rates under this Act."

The field and garden were exempted from rating for the same purposes as are above specified, under the local Act of 5 G. 4, c. xxii., which was passed for the purpose of paving, lighting, and otherwise improving *the town and borough of Plymouth*, and gave a power of rating for those purposes, and made all the tenements forming *the populous or town part* of the borough rateable, and so, by implication, exempted from rate all the tenements forming the residue of the same borough. The benefits ^{*}were for the town property: the burden ^[*708] was laid on the town property. The kind of property that was to be rateable was town property: and the kind to be exempt was that which was not town: the exemption was not with reference to its local situation in space, but with reference to its proximity to dense inhabitation: the rateability is not laid upon one area, and exemption upon another, on account of its latitude and longitude; but, the purpose of the rate being given, the question to be considered is what kind of property will be benefited by effecting that purpose. The limits of rateability and exemption are not fixed in locality by the local Act; but they are to shift constantly as the nature of the property is changed by the growth of the town. The rate is to be laid on all tenements, with their appurtenances, used for purposes of residence or trade, if they shall adjoin to any street made or to be made within the *populous or town part* of the borough, or be so contiguous to some street made or to be made within the *populous or town part* as that there be not more than one hundred feet from such street to such tenement, with its appurtenances, and so on from tenement to tenement.

Although town is in known contrast to country, yet the difficulty of drawing a precise line where the town ends has been often felt. The town would be conceded to continue so long as there are streets lying between rows of continuous houses. The doubt begins when the continuity of the houses ceases: and the statute here has said that the rateability shall continue as long as the interval between the street and the nearest building, with the garden, curtilage, or yard thereto belonging, ^{*}does not exceed one hundred feet. At the outskirts of the ^[*709] town the habitations are less dense; and the test of rateability is proximity within a hundred feet of a street or of a tenement rateable on account of such proximity.

Although the exemption is ascertained by local description, still the

description is of the kind of property, viz., that which is not within the town. The property of the appellant was exempt, according to this principle, on account of its kind; and therefore it ought to continue exempt under The Public Health Act, 1848.

In *Tait v. Carlisle Local Board of Health*, 2 E. & B. 492 (E. C. L. R. vol. 75), the precinct of the cathedral was conditionally exempt from all the jurisdiction of the Commissioners under the local Act, and therefore from being rated by them, provided the dean and chapter elected to execute the Act within that precinct. This Court decided that, even if the precinct could be said to be exempt from rate, the kind of property was not exempt, but a personal privilege of the dean and chapter was recognised, so as to give to that body the option of excluding the town Commissioners, and doing the duties of the Commissioners themselves. By sect. 63, if the dean and chapter, having elected to act, neglected to do those duties, they were liable to be convicted and fined before the quarter sessions. And, by sect. 35, the property within the precinct was declared liable to be rated; and so it could not be said to be exempt.

In *Guardians of Chelmsford Union v. Chelmsford Local Board of Health*, 2 E. & B. 500, note (a) (E. C. L. R. vol. 75), it appeared that the parish of Chelmsford comprised the town of Chelmsford and the *710] hamlet of Moulsham, and other lands in the parish. The power of rating, by sect. 24, extended to the tenements in the town of Chelmsford and the hamlet of Moulsham. Thus the burden was to be on the area that had the benefit. But there was a proviso that, within that area, the kind of property that had no benefit from the town improvements was to be exempt from rate, that is, tithes, and the lands, hop grounds and garden grounds other than gardens adjoining to and let with rated houses. And there was a further proviso that no lands in the parish of Chelmsford situated at a greater distance from the parish church than so many yards should be rateable. It is not stated that this boundary was coterminous with the town and hamlet: but we considered that this part of the proviso gave, in effect, the boundary of the area of jurisdiction. The power of rating was confined to that area; and the lands beyond that area were exempt in this sense only, that it was land out of the district of jurisdiction. Afterwards the whole parish of Chelmsford, including the town of Chelmsford and the hamlet of Moulsham, and the other lands, were brought under The Local Board of Health, who made a rate on all the tenements within the parish. And an exemption was claimed for a tenement out of the town and hamlet above mentioned, but within the parish, on the ground that it had been exempt from the Commissioners for the town and hamlet. But the Court decided against the exemption: it was not a kind of property *within the district* subject to the jurisdiction of the Commissioners exempt from rates for certain purposes, but a property without the district; and, being without the district, every kind of property was *711] exempt. It was not an exceptional exemption within an area where there might have been a liability, but an absolute exemption by reason of local situation beyond the boundary of the area of rateability. *

These cases are no authority for the respondents. And, for the reasons aforesaid, I am of opinion that neither the field nor the garden

were liable to be assessed, and that the rate should be amended accordingly by striking out the assessment on the appellant.

SHORTLAND, Appellant, v. The Local Board of Health for the Borough of PLYMOUTH, Respondents.

In this case the house and garden of the appellant is within one hundred feet of the railway which is rated.

And the question is, Whether the railway is a house or building, or a garden, curtilage, or yard thereunto adjoining or belonging. The respondents contend that it is: but I am inclined to think that it is not. The station, with its appurtenances, might be a yard adjoining and belonging to a building: but the line of railway itself would not be comprised in the term yard, nor in either of the other words: and the case finds that there is no rated building within one hundred feet.

As the premises are admitted to have been exempt under the local Act, and as this ground of liability from proximity to rated premises within the local Act fails, I give my opinion for the appellant. My opinion as to the application of the proviso in sect. 88 of The Public Health Act, 1848, is given at length in the case of *Luscombe*. My opinion therefore is that the rate be amended by striking out the name of the appellant.

***PONTEY, Appellant, v. The Local Board of Health for the Borough of PLYMOUTH, Respondents. [*712]**

In this case the field and garden adjoin a street; and were rateable under the local Act.

The rate is therefore confirmed.

Lord CAMPBELL, C. J.—I agree with my brothers Wightman and Crompton that our judgment ought to be for the respondents. I have never had any doubt, since *Tait v. Carlisle Local Board of Health*, 2 E. & B. 492 (E. C. L. R. vol. 75), that the exemption in the Public Health Act, 1848, applies to kind and not to locality. My only doubt was, whether the local Act, 5 G. 4, c. xxii., s. 105, might not be considered to refer to kind rather than locality. For, although local bounds are defined for the purpose of ascertaining what is rateable, still, for the reasons which my brother Erle has referred to, the kind of property to be rated may be limited, and this exemption may have been intended to apply to the kind of property. But, upon the whole, I think that the terms of stat. 5 G. 4, c. xxii., s. 105, are so express as to locality that we must assign exemption to locality and not to kind; and that therefore our judgment must be for the respondents. Rate confirmed.

***The QUEEN v. The Justices of the West Riding of YORK-SHIRE. June 10. [*713]**

Parties appealing against an order of removal are entitled to take the full number of days given by stat. 11 & 12 Vict. c. 31, s. 9. If at the expiration of those days there is time to give effectual notice of trial for the next sessions, it should be done; if there is not time for such notice of trial, the appeal, if it be practicable, ought to be entered and respited at the next sessions; and it is too late to enter it at a subsequent sessions.

H. W. West had, in Easter Term, obtained a rule nisi for a mandamus to the justices of the West Riding to enter continuances and hear an appeal against an order of two justices for the removal of a pauper from the township of Halifax to the parish of Bromsgrove. From the affidavits on both sides it appeared that, on the 21st day of November, 1857, the officers of the appellant parish received the order and grounds of removal. On the 9th December they applied for a copy of the depositions, and they received one on the 12th December. On the 23d December they sent to the overseers of the respondent township a notice that they intended, "at the General Sessions of the Peace to be holden in and for the said West Riding of Yorkshire, next after the expiration of fourteen days at least from the service of this notice, to commence and prosecute an appeal" against the order complained of. This notice was received on the 24th day of December. It appeared by the affidavits that the officers of the poor of the appellant parish believed that, by the practice of the West Riding Sessions, fourteen days' notice of trial was required; but in fact ten clear days' notice only was required. The sessions, next after 24th December, 1857, were held on 5th January, 1858. At these sessions nothing was done. The next sessions were held on 5th April, 1858. The appeal was entered and brought on *714] *for hearing at those sessions. The Court of Quarter Sessions, after argument, refused to hear it, on the ground that the appeal was too late.

J. B. Maule, in last Easter Term, (a) showed cause.—The appellants in this case were bound to go to the sessions holden on the 5th January. The notice of appeal was actually given on 24th December. It might have been accompanied by notice of trial, which would then have been given ten clear days before the 5th January. Stat. 4 & 5 W. 4, c. 76, ss. 79, 81, does not affect the practice of sessions as to the notice of trial: *Rex v. The Justices of Suffolk*, 4 A. & E. 319 (E. C. L. R. vol. 31). If the grounds of the appeal had been delivered with that notice, though less than fourteen days before the sessions, it would have been a compliance with stat. 4 & 5 W. 4, c. 76, s. 81, so that the appeal might have been tried at the January sessions; which therefore were clearly the next practicable sessions for all purposes. But, even if there was not time to try at those sessions, the appeal should have been entered and respite there. The practicability of the sessions for that purpose must depend upon the time when the order of removal was served; the appellants cannot, by lying by so as to prevent themselves from giving effectual notice of trial for those sessions, render them not the practicable sessions: *Regina v. Sevenoaks*, 7 Q. B. 136 (E. C. L. R. vol. 53); *Regina v. Justices of Peterborough*, 7 E. & B. 643 (E. C. L. R. vol. 90). The appellants here, in their notice of appeal, claim to pass over the January sessions: but if they had no right to do so their claim is inoperative.

*715] **Pigott*, Serjt., and *H. W. West*, in support of the rule.—There was no laches on the part of the appellants. By stat. 11 & 12 Vict. c. 31, s. 9, they were entitled to take twenty-one days to consider whether they would apply for the copy of the depositions. They did apply within that time, and received them on 12th December. They were then, by the statute, entitled to take fourteen days

(a) May 8th. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

to determine whether they would appeal or not. They in fact only took twelve days; and it is not possible for the Court to say that a shorter period would have sufficed. Then, at the time when they actually did give notice of appeal, it was too late to try at the January sessions. It has always been considered that the grounds of removal must be given at least fourteen days before the trial: *Regina v. The Justices of Suffolk*, 4 A. & E. 319 (E. C. L. R. vol. 31); *Regina v. The Justices of Lancashire*, 4 Q. B. 910 (E. C. L. R. vol. 45). And, unless the sessions were practicable for all purposes, the appellants might pass them over: *Regina v. Justices of Surrey*, 3 D. & L. 343; *Rex v. Justices of Devon*.(a)

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

In this case the parish officers of Bromsgrove had brought on an appeal for trial at the Quarter Sessions for the West Riding of the county of York, on the 5th of April last, against the overseers of the township of Halifax; when, after hearing counsel on both sides, they refused to hear the appeal, and dismissed it, on the ground that they had no jurisdiction, because the appeal *had not been entered and respite at the previous sessions held on 5th January last. [*716 The appellants obtained a rule to show cause why a mandamus should not issue, commanding the Sessions to hear the appeal; and the question for the Court is, whether, under the circumstances of the case, the justices ought to have heard the appeal.

The appeal was against an order for the removal of a pauper; and the dates of the several proceedings are as follows. On the 21st of November, 1857, an order of removal, dated the 20th of November, was received by the parish officers of Bromsgrove, accompanied by a statement of the grounds of removal. On the 9th of December, the parish officers of Bromsgrove applied for a copy of the depositions on which the order was granted, and received a copy on the 12th of December. On the 23d of December the parish officers of Bromsgrove sent a notice of appeal to the overseers of Halifax, which was received by the latter on the 24th of December. In this notice the officers of Bromsgrove informed the officers of Halifax that they intended, at the Quarter Sessions to be holden *next after the expiration of fourteen days at least from the service of that notice*, to commence and prosecute an appeal against the order of removal.

The next sessions were held on the 5th of January, *twelve days only* from the service of the notice of appeal; and the appellants passed those sessions wholly by, and neither gave notice of trial for those sessions, nor entered and respite their appeal; and the question is, whether they were bound to do either.

By stat. 11 & 12 Vict. c. 31, s. 9, no appeal is to be allowed against an order of removal, if notice of appeal is not given within twenty-one days after receipt of the statement of the grounds of removal, unless within those *twenty-one days a copy of the depositions shall [*717 have been applied for and received; and then fourteen days from the time of the sending the copy is to be allowed for giving notice. The time of receipt in due course of post is to be considered as the time of sending, by reasonable construction.(b)

(a) Note (a) to *Rex v. The Justices of Kent*, 3 B. & C. 640 (E. C. L. R. vol. 15).

(b) See *Regina v. Slawstone*, 18 Q. B. 288 (E. C. L. R. vol. 83); *Regina v. Re order of Richmond*, ante, p. 253.

In the present case, therefore, the appellants had twenty-one days from the 21st of November, plus fourteen days from the 12th of December (when they received a copy of the depositions), to give their notice of appeal; and they gave their notice, which was received within the time, namely, on the 24th of December, on which day there were twelve days inclusive, and ten clear days exclusive, of the day of holding the then next quarter sessions, which were held on the 5th of January. The appellants undoubtedly might take all the time they did, without losing their right to appeal; but, on the other hand, they might, if they had pleased, have applied for and obtained a copy of the depositions earlier: or, having received a copy of the depositions, might have given notice of appeal in time to try at the sessions held on the 5th of January last. Those sessions, therefore, were the next practicable sessions at which the appellants might, if they had been so minded, have entered and tried their appeal, according to the cases of *Regina v. Justices of Peterborough*, 7 E. & B. 643 (E. C. L. R. vol. 90), and *Regina v. Sevenoaks*, 7 Q. B. 136 (E. C. L. R. vol. 53), in which it was decided that an appellant cannot by his negligent or dilatory conduct make the sessions impracticable which in fact were practicable sessions, and then pass *718] them wholly over as not being *practicable. He ought at least to enter and respite his appeal; or it may be reasonably considered that he has given up the intention of really prosecuting the appeal, and only means to procrastinate as much as possible. The case of *Regina v. Justices of Surrey*, 3 D. & L. 343, is by no means inconsistent with the cases of *Regina v. Sevenoaks* and *Regina v. Peterborough*, and indeed was recognised by the Court in the latter case; for in the case of *Regina v. Justices of Surrey* there was not time for the appellant to take the necessary steps to try the appeal at the next sessions, however well disposed and diligent he might have been; and it was therefore considered, and we think properly, that the very next sessions were not in that case the next practicable sessions for the purpose of the appeal.

In the present case, the appellants have, by the terms of their notice, expressly passed over the sessions held on the 5th of January, as they state that they intend to commence and prosecute an appeal at the sessions to be holden fourteen days at least from the service of that notice, a period which excludes the sessions held on the 5th of January. No valid reason has been assigned on the part of the appellants for the postponement of the commencement and prosecution of the appeal to the sessions held next after the expiration of fourteen days from the service of the notice, nor why the appellants claim to be entitled to fourteen days beyond the twenty-one days and the fourteen days mentioned in stat. 11 & 12 Vict. c. 31, s. 9.

As a rule, we think that the parties appealing are entitled to take the *719] twenty-one days and the fourteen *days mentioned in stat. 11 & 12 Vict. c. 31, s. 9, and that, if, at the expiration of the last of those days, there is time to give effective notice of trial of the appeal at the then next sessions, such notice ought to be given; but that, if there is not time to give such notice of trial, the appeal ought to be entered and respited at the then next sessions following the expiration of the fourteen days: such an entry and respite will be the only step the appellant can then take to show his intention to prosecute his appeal,

as he will do so at the peril of being obliged to pay costs in case he omits further to prosecute it: and this is in accordance with the modern practice.

In the present case, we think that the determination of the Sessions was right, and that the rule for a mandamus should be discharged.

Rule discharged.

WAITE v. The NORTH EASTERN Railway Company. June 10.

P. had charge of a child too young to take care of itself, and took two tickets at a railway station for the purpose of the two being conveyed on the railway. While P. and the child were on the railway, after P. had taken the tickets, the child was injured by an accident which was caused by the joint negligence of P. and the company's servants.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the child could not maintain an action against the company.

ACTION by Alexander Waite, the younger, an infant, by Alexander Waite, his next friend.

The first count of the declaration stated that defendants were possessed of a certain railway locomotive engine and tender and a train of carriages attached thereto, and were, by their servants in that behalf, propelling, driving, managing, and conducting the same *upon [720 and along a certain railway: that plaintiff was lawfully upon and crossing the said railway: and that defendants, by their said servants, so carelessly, negligently, and improperly propelled, drove, managed, and conducted the said engine, tender, and train of carriages, that the same, by and through the carelessness, negligence, and improper conduct of defendants, by their servants in that behalf, ran, came, and were driven upon and against plaintiff, and cast and threw him down and severely wounded and injured him.

The second count alleged that defendants were possessed and had the control and custody of a certain railway for the conveyance of passengers by railway trains for hire, from a place called Velvet Hall to Berwick-upon-Tweed, and also of a certain railway station upon the said railway, at the first-mentioned place, which said railway station was in the care and custody of the defendants by their servants, and was the station provided by the defendants for all persons travelling by the said railway from Velvet Hall aforesaid to Berwick-upon-Tweed aforesaid to procure their tickets: that defendants required all persons desirous of so travelling as aforesaid to pass through and procure tickets at the said station: that plaintiff, at the request of defendants, became and was a passenger to be conveyed by defendants by railway train from Velvet Hall aforesaid to Berwick-upon-Tweed aforesaid, by a certain railway train of defendants, then about to start from Velvet Hall aforesaid to Berwick-upon-Tweed aforesaid, for reward in that behalf then paid by plaintiff to defendants: that plaintiff became and was such passenger, by purchasing from defendants, who then delivered to plaintiff, a certain railway ticket, entitling him to be conveyed as aforesaid, at a certain *part of the said railway station provided by defendants for the [721 issuing of tickets to persons about to travel between the places aforesaid, and at which defendants required and compelled all persons so about to travel as aforesaid to take tickets for the said journey: that

it was necessary for plaintiff, and all persons so purchasing tickets as aforesaid, in order to enable them to enter the said railway train then about to proceed from Velvet Hall aforesaid to Berwick-upon-Tweed aforesaid, to pass across the said railway at a certain place where it passes through the said station: that, just about the time when plaintiff so purchased, and defendants so delivered to him, the said ticket as aforesaid, a certain other railway train, of and under the control of defendants, was then, as defendants knew, about to pass through the said station upon and over a certain line of rails of the said railway over which plaintiff and all other persons so passing across the said railway as aforesaid were obliged and compelled to go on foot in passing across the said railway as aforesaid. That plaintiff, after he had purchased, and after defendants had so delivered to him, the said ticket as aforesaid, and after he had become such passenger as aforesaid, was, at the time of the committing of the grievances hereinafter mentioned, properly and lawfully in and upon the said railway, at the place where it passes through the said station, going across the said line of rails aforesaid, on foot, in order to enable him to enter the said first-mentioned train: and that, by and through reason of the negligence of defendants in not giving any notice or warning to plaintiff that the said railway train secondly above mentioned was then about to pass through the said station upon and over the said line of rails aforesaid, plaintiff, while *722] *passing across the said railway and going on foot over the said line of rails, was knocked down by the said railway train, which did pass through the said station upon and over the said line of rails just as plaintiff was so going on foot over the same, and was thereby wounded and injured.

Pleas. 1. Not guilty.

2. That plaintiff was not lawfully upon or crossing the said railway; but, on the contrary thereof, plaintiff and a person, to wit, Mrs. Arabella Park, in whose care and under whose direction and control plaintiff then was, were wrongfully, improperly, and incautiously upon and crossing the said railway, with the means of seeing and knowing, at that time, that the said engine, tender, and train of carriages in that behalf mentioned were then passing and proceeding in and upon the said railway, and near to and approaching the place at which plaintiff was upon and crossing the said railway: which occasioned the said damage and injury as much as the negligence of defendants.

3 A plea similar to 2, with the additional allegation that it was not necessary for plaintiff to be in or upon the said railway, or to cross over the said line of rails at that time, in order to enter the said railway train then about to proceed from Velvet Hall aforesaid to Berwick-upon-Tweed aforesaid.

Issues on all the pleas.

On the trial, before Martin, B., at the last Spring Assizes for Northumberland, it appeared that defendants had the management of a railway from Tweedmouth to Kelso; and that, on 1st January, 1857, plaintiff, an infant of the age of five years or thereabouts, accompanied Mrs. *728] Park, his grandmother, to the Velvet Hall Station, *one of the stations on the Tweedmouth and Kelso Railway, for the purpose of proceeding together to Berwick-upon-Tweed by the 10.51 A. M. train. The plaintiff and Mrs. Park arrived at the Velvet Hall station at 10.30.

Mrs. Park bought of the station-master a ticket for herself and a half ticket for plaintiff, which entitled them to be carried to the Tweedmouth Station near Berwick by the 10.51 train. The platform for the departure of passengers going from Velvet Hall Station to Tweedmouth was on the side of the railway opposite to the ticket-office: and it was necessary for such passengers to cross the railway on a level to get to that platform. The station-master, in giving out the tickets, informed Mrs. Park that the train by which she and plaintiff were to go to Tweedmouth would not be there for a quarter of an hour: the station-master saw Mrs. Park and plaintiff go, after having got their tickets, and sit down by the fire. The station-master, who was the only person in charge of the station, after giving out the said tickets, immediately left the ticket-office and went to the end of the station yard to superintend the unloading of some goods, and returned in seven or eight minutes, which was not until after the injuries which are the cause of the present action had been sustained. While so engaged, the station-master was unable, owing to the position in which he was, to see the ticket-office or the platform. Neither could he see along the line towards Tweedmouth: but could see along the line towards Kelso. Any train, as it approached the Velvet Hall Station from Kelso, could be seen by any one on the platform for a considerable distance: the station-master generally went into the room and told the passengers to cross when the train was in sight; and had done so to *Mrs. Park when she was there, she [*724 having been frequently in the habit of going by that train to Tweedmouth. The station-master did not warn plaintiff or Mrs. Park against crossing the line, or inform them that another train was expected to pass the station before the arrival of their train. Nor were any means adopted, by locking the door of the ticket-office, or otherwise, to prevent the plaintiff or Mrs. Park crossing the line at any time; nor was there any clock at the station. Before the passenger train for which the plaintiff and Mrs. Park had taken tickets arrived at the station, a goods train coming from Kelso, with a tender before the engine, passed the Velvet Hall Station, going towards Tweedmouth; Mrs. Park and the plaintiff were struck by it as they were crossing the line to go to the platform already mentioned. Mrs. Park was killed: and plaintiff was severely injured; and for that injury the present action was brought. The goods train was not a train which stopped at the station, and passed the station at its usual pace of about twenty miles an hour. No one saw Mrs. Park or plaintiff in the act of crossing the railway; and neither the station-master nor any one on the goods train knew that the injuries had been sustained until after the goods train had passed the station.

The jury, in answer to questions put to them by the learned Judge, found that defendants were guilty of negligence, and that Mrs. Park was also guilty of negligence which contributed to the accident; and they assessed the damages at 20*l*. There was no negligence, nor was any suggested on the part of the infant plaintiff. The learned Judge directed a verdict for the plaintiff for 20*l*., with leave to the defendants to move to enter a verdict for them or for a nonsuit.

**Pickering*, in last Easter Term, obtained a rule to show cause [*725 why the verdict should not be set aside and a verdict entered for defendants upon all the issues, on the ground that the negligence of Mrs.

Park, as found by the jury, entitled the defendants to a verdict; or why a new trial should not be had, on the ground that the direction respecting the negligence of Mrs. Park was not correct.

In this Term,^(a)

Overend, Manisty, and C. Warner Lewis showed cause.—The infant is entitled to recover. The jury have found that there was negligence, both in the defendants and in Mrs. Park, the person in charge of the infant: and the question of law which arises is, Whether, in an action by an infant for injury caused to him by the negligence of the defendants, the defendants can set up, by way of defence, the negligence of a person in charge of the infant, contributing to the accident. The defendants here and Mrs. Park are both tort-feasors; and an action would lie against either by the infant: neither, therefore, could set up, as a defence, that the negligence of the other contributed. It has, no doubt, been held that the contributory negligence of the plaintiff's agent is a defence: *Thorogood v. Bryan*, 8 Com. B. 115 (E. C. L. R. vol. 65); *Cattlin v. Hills*, 8 Com. B. 123. But, first, the decision in *Thorogood v. Bryan* has not been considered thoroughly satisfactory; and the case is mentioned, in the note of the last editors of *Smith's Leading Cases*^(b) to *Ashby v. White*, 2 Ld. Raym. 938, as not altogether consistent with *726] the decision in *Rigby v. Hewitt*, 5 Exch. 240.† And, *secondly, there is no agency here, because the plaintiff was too young to appoint an agent, or to make any choice of the person to take charge of him. *Lynch v. Nurdin*, 1 Q. B. 29 (E. C. L. R. vol. 41), is an authority for the plaintiff. There the plaintiff, a young child, brought an action for injury caused to him by the horse and cart of the defendant, who had neglected to take charge of them; and it was held that the action lay, although the plaintiff's own negligence had contributed in great part to the accident. Further, the second count charges a tort arising out of a contract; and it is questionable whether the doctrine of contributory negligence applies: *Martin v. The Great Northern Railway Company*, 16 Com. B. 179 (E. C. L. R. vol. 81). [Lord CAMPBELL, C. J.—That, no doubt, may make some difference; but surely the fact that the plaintiff, by ordinary care, might have avoided the accident would be a defence in either case.] In *Martin v. The Great Northern Railway Company* the Court appears to have entertained, at the least, considerable doubt upon the point. Further, there was no evidence of negligence on the part of Mrs. Park. (The argument upon this point is omitted.)

Lord CAMPBELL, C. J., now delivered the judgment of the Court; *Pickering and Mellish*, who were to support the rule, not having been called on.

In this case we think that the rule ought to be made absolute for entering a verdict for the defendants, or for a nonsuit. The jury must be taken to have found that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty *727] of negligence without which the accident would *not have happened; and that, notwithstanding the negligence of the defendants, if she had acted upon this occasion with ordinary caution and prudence, neither she herself nor the infant would have suffered. Under

(a) June 9th. Before Lord Campbell, C. J., Erie and Crompton, Js.

(b) 1 *Smith's L. Ca.* 220 (4th ed.).

such circumstances, had she survived, she could not have maintained any action against the company; and we think that the infant is so identified with her that the action in his name cannot be maintained. The relation of master and servant certainly did not subsist between the grandchild and the grandmother; and she cannot, in any sense, be considered his agent: but we think that the defendants, in furnishing the ticket to the one and the half ticket for the other, did not incur a greater liability towards the grandchild than towards the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild.

We do not consider it necessary to offer any opinion as to the recent cases in which passengers by coaches or by ships have brought actions for damage suffered from the negligent management of other coaches and ships, there having been negligence in the management of the coaches and ships by which they were travelling, as, at all events, a complete identification seems to us to be constituted between the plaintiff and the party whose negligence contributed to the damage which is the alleged cause of action, in the same manner as if the plaintiff had been a baby only a few days old, to be carried in a nurse's arms.

Rule absolute.

*IN THE EXCHEQUER CHAMBER. [728

WAITE, Appellant, v. The NORTH EASTERN Railway Company,
Respondents. [Feb. 4, 1859.]

[For syllabus, see p. 719.]

THE plaintiff having appealed against the above decision, the case was now argued.

Manisty, for the appellant (plaintiff below).—As the plaintiff here was an innocent party, who had not selected the person under whose care he was, he could not be said to contribute to the damage. [WILLES, J.—If the proper natural guardian of the plaintiff consigned it to the care of the grandmother, the grandmother's was the legal care.] It is no more than if the plaintiff had been an infant in the arms of a person who had been careless. [WILLES, J., referred to Hargrave's note (18) [67] on Co. Lit. 88 b.] When a man, by an act of his own will, selects an agent, it may be that the negligence of the agent disqualifies the principal from recovering; that is the ground, if any, on which the cases are to be supported which decide that, where a party, being in an omnibus or a steam-vessel, is damaged by the negligent management of another omnibus or steam-vessel, he cannot recover if there has been negligence on the part of those having the care of the omnibus or steam-vessel in which he himself is carried: *Thorogood v. Bryan*, 8 Com. B. 115 (E. C. L. R. vol. 65); *Cattlin v. Hills*, 8 Com. B. 123. [WILLIAMS, J.—Even that principle *has been seriously ques- [*729
tioned by the learned editors of *Smith's Leading Cases* in the
note (a) to *Ashby v. White*, 2 Ld. Raym. 938.] They put the case of a
mischievous collision caused by two drunken coachmen: it is not easy to

(a) 1 *Smith's L. Ca.* 220 (4th ed.).

see why the passengers in each carriage should not recover against each coachman. [MARTIN, B.—Do you say that the child here might, if the grandmother had survived, have sued her?] Why should he not, as well as a patient may sue a surgeon for negligence after taking charge of the case? [WILLES, J.—Did you ever hear of an action against a surgeon for not taking charge of a case?] Here the charge was in fact undertaken. But the plaintiff, being naturally incapable of exercising a will, did not stand to the grandmother in the relation of principal to agent or master to servant: and he is not to be without compensation for injury suffered from the negligence of the defendants. If the father had sent the child without either ticket or attendant, still the defendants, if they had injured the child by their negligence, would be bound to compensate him. [BRAMWELL, B.—I have always thought that the cases of the class to which you have been alluding were rightly decided, but on wrong reasoning. Here the declaration insists upon the negligence of the defendants: what does Not guilty put in issue?] The defendants' negligence as between the plaintiff and the defendants. It never was held that a party injured might not sue both of two distinct tort-feasors. In *Thorogood v. Bryan*, Williams, J., whose ruling at *730] Nisi Prius was supported, said that he had acted on the dictum in *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244.† But that dictum was supposed to be founded on *Butterfield v. Forrester*, 11 East 60, which last-mentioned case shows only that a party cannot recover for damage to which he himself contributes: the question of constructive contribution, which must be here insisted upon, did not arise. In *Rigby v. Hewitt*, 5 Exch. 240,† and *Greenland v. Chaplin*, 5 Exch. 243, the jury found that there was not negligence, on the part of those supposed to be employed by the plaintiffs, sufficient to exonerate the defendants: those cases, therefore, do not constitute an authority for the point now in question, beyond the occurrence of some dicta. In *Quarman v. Burnett*, 6 M. & W. 499,† and *Reedie v. London and North Western Railway Company*, 4 Exch. 244,† it was sought to make the defendants liable on the ground that they had employed those who did the mischief, and were thus identified with them; and this failed: but the liability of the parties who really employed those who did the mischief was not denied. After the verdict, it must be taken that here the mischief was occasioned by the negligence of the defendants. [BRAMWELL, B.—It is perhaps not easy to say what absolute negligence is.] In *Lynch v. Nurdin*, 1 Q. B. 29 (E. C. L. R. vol. 41), it might have been said that the father of the plaintiff, by allowing him to go about unattended, contributed by his own negligence to the damage; and that would have been an answer, upon the principle for which the defendants here contend. [MARTIN, B.—That case was questioned *731] *in *Lygo v. Newbold*, 9 Exch. 302.† POLLOCK, C. B.—If the father's negligence had been expressly found by the jury, that might perhaps have made a difference.]

Mellish, contra.—The Court below did not profess to decide as to the correctness of the view taken in *Thorogood v. Bryan*, 8 Com. B. 115 (E. C. L. R. vol. 65), which it is not necessary to insist upon for the purpose of the present case. The complaint here is that the plaintiff, being a passenger, was injured through the negligence of those who managed the train in which he was a passenger. He could become a

passenger only through a contract. How then did it appear that he had become a passenger? Only from the circumstance that his grandmother had taken out the ticket. The negligence complained of consists, not in not warning him, but in not warning her. It therefore is essential to the case of the plaintiff that the grandmother should be identified with him. Without this identity there is no legal cause of complaint. The defendants, like any one else, must take reasonable care of a child, if they take charge of him: but they are not bound to take charge of him at all unless he is under the proper care of a grown-up person; and they did no more here than receive him as a passenger under such charge. That being so, the person who has the care is the person to whom they look and with whom they contract: any other principle would impose a most unreasonable responsibility on a railway company. [POLLOCK, C. B.—Suppose a man to drive his own gig, in which his child is, and to come into collision with another carriage through the negligence of both drivers. Can the *child recover against the owners of the other carriage?] That would be manifestly absurd. [*732] If it were necessary to consider the decision of *Thorogood v. Bryan*, 8 Com. B. 115 (E. C. L. R. vol. 65), that case clearly rests upon good sense. On what principle is it that the negligence of the plaintiff is an answer in such cases? First, it shows that the negligence of the defendant is not the cause of the damage; and, secondly, that the plaintiff, who could by reasonable care have avoided the accident, is not entitled to complain. And those grounds are sufficient to justify the decision in *Thorogood v. Bryan*, 8 Com. B. 115 (E. C. L. R. vol. 65).

Overend (in the absence of *Manisty*), in reply.—It does not follow, from the company accepting the child as a passenger, that they accepted the grandmother as his agent. Suppose a party is injured by the collision of two carriages in neither of which he is: he may recover against both. Now that is the present case, unless the grandmother is, for the purpose of the conveyance, the agent of the child; and that she cannot be, inasmuch as the child has no capacity for selecting an agent. But, further, the jury have found positive negligence on the part of the defendants: that puts an end to the defence from negligence of the plaintiff, which is a defence properly resting on estoppel. Nor is this quite like the case of a child in arms: the company might have ordered the plaintiff to be taken off the railway, and ought to have done so.

COCKBURN, C. J.—I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. *I put the case on this [*733] ground: that, when a child of such tender and imbecile age is brought to a railway station or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. Such care not being used, where the child has no natural capacity to judge of the surrounding circumstances, a child might get into serious danger from a state of things which would produce no disastrous consequences to an adult capable of taking care of himself. Here the child was under the charge of his grandmother; and the company must be taken to have received the child as under her control and subject to her management. The plea and the finding show that the negligence of the defendants contributed partially to the damage; but that

the negligence of the person in whose charge the child was, and with reference to whom the contract of conveyance was made, also contributed partially. There is not therefore that negligence on the part of the defendants which is necessary to support the action.

POLLOCK, C. B.—I entirely agree. The shortest way of putting Mr. *Mellish's* argument is that this is not a mere case of simple wrong, but one arising from the contract of the grandmother on the part of the plaintiff, who must avail himself of that contract, without which he cannot recover. There really is no difference between the case of a person of tender years under the care of another and a valuable chattel committed to the care of an individual, or even not committed to such *734] care. The *action cannot be maintained, unless it can be maintained by the person having the apparent possession, even though the child or the chattel was not regularly put into the possession of the person, as, for instance, though the party taking charge of the child had done so without the father's consent; that circumstance would make no difference as to the question of the child's right. That is my reason for pressing this argument of Mr. *Mellish*, as it meets every possible view of the case.

WILLIAMS, J.—I am entirely of the same opinion. The view of the jury was that the accident would not have occurred but for the negligence of the grandmother. There was here, as it seems to me, from the particular circumstances of the case, an identification of the plaintiff with the grandmother, whose negligence is therefore an answer to the action. At the same time, I do not mean to express any doubt that, generally, where a child is of such tender years as here, and is carried about by any person having it in charge, the rule as to joint negligence of plaintiff and defendant applies. The person who has the charge of the child is identified with the child. If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident which by the exercise of reasonable care he might have avoided, it would be strange to say that, though he himself could not maintain an action, the child could. So, if the child be in the arms of a person who does not choose to get out of the way of a train. But it is unnecessary to insist on this general ground: because, on the mere narrow view of the plaintiff's right in this case, the defence must prevail.

*735] *(MARTIN, B., had left the Court during the argument for the respondent.)

CROWDER, J.—I am of the same opinion, on the grounds given in the judgment delivered in the Court of Queen's Bench. The case is the same as if the child had been in the mother's arms. There is an identification such that the negligence of the grandmother deprives the child of the right of action. Now the finding of the jury would clearly have prevented the grandmother from recovering: it therefore has the same effect in respect of an action by the child. It would be monstrous and absurd if there could be a distinction.

(WILLES, J., had left the Court during the argument for the respondent.)

BRAMWELL, B.—I am of the same opinion. In form the action is for a wrong; but it is in fact for a breach of duty created by contract. It is alleged that the plaintiff was lawfully on the railway. That could be so only on the supposition that he had become a passenger through the

instrumentality of himself or another. There must be a contract or duty. It is impossible here to say that the company contracted any other duty towards the infant, thus accompanied, than they would have contracted towards an adult, or that they were responsible for what would have occasioned no mischief but for the negligence of a person having the custody of the plaintiff. That would be an absurdity: and we should have to hold that, where a chattel is injured partly through the negligence of the party having charge *of it, such person could maintain no action, but that the owner, if a different person, could. [*736] The case appears even more distinct upon the pleadings. The first count charges that the plaintiff was lawfully upon and crossing the railway; the second plea denies this, and states that the plaintiff was under the direction and control of a person who, with the plaintiff, was wrongfully on the railway; and the verdict shows this plea to be true. The second count states also that the plaintiff was lawfully on the railway; and it is similarly answered.

WATSON, B.—I am of the same opinion. The plaintiff is a child of an age at which he is incapable of exercising proper care for himself. The charge against the company is that they did not give proper warning to the grandmother: and all the duties which arose towards the child were with reference to it as being under the charge of the grandmother; and, as my brother Williams says, the case is the same as if the plaintiff had been a child in arms. Many other cases have been put and discussed by Mr. *Manisty*; but these we need not now examine.

Judgment affirmed.

As to the application of the doctrine *v. Cone*, 22 Verm. 213; *Rauch v. of concurring negligence to children of Lloyd*, 31 Penn. St. 358; *Penn. Railroad tender years, see Hartfeld v. Roper*, road Co. *v. Kelly*, Id. 372; *Penn. 21 Wend. 615*; *Lehman v. Brooklyn, Railroad Company v. Zebe*, 33 Penn. 29 Barb. 236; *Daley v. Norwich, &c., St. 327*.
Railroad Co., 27 Conn. 591; *Robinson*

*WHEATCROFT v. FOSTER. June 10.

[*737]

Under sect. 26 of stat. 19 & 20 Viet. c. 108, a Judge of Q. B. ordered that the trial in an action brought in Q. B. should be had in a county court. No application was made to him to impose any terms. The action having been tried, the costs were taxed by the Master in Q. B. according to the scale of the Superior Courts, so far as regarded the proceedings in Q. B., but, so far as regarded the proceedings in the county court, according to the county court scale.

On motion to review his taxation: Held that he was justified in so far adopting the county court scale as his guide.

FROM the affidavit of the defendant's attorney in this case, it appeared that the action was brought in the Court of Queen's Bench, by summons dated 21st April, 1857, to recover 68*l.* 7*s.* 6*d.* for goods sold and delivered, and on accounts stated. The declaration was delivered on 24th July, 1857. On 1st August, 1857, defendant pleaded, except as to 42*l.* 2*s.* 6*d.*, Never indebted; and, as to that sum, he paid the money into Court. The plaintiff joined issue on the plea of Never indebted, and

E., B. & E.—26

took the money out of Court. On 3d November, 1857, Erle, J., ordered that the cause should be tried before the judge of the county court of Nottinghamshire, at Bingham, and that a jury should be summoned. The cause was tried accordingly on January 13th, 1858; when a verdict was found for defendant. Defendant carried in his costs for taxation, made out on the ordinary scale of costs in actions in the Superior Courts above 20*l.*; but the Master was of opinion that he could allow the costs of and relating to the trial according only to the scale of the county court; and he taxed accordingly.

From the Master's report, it appeared that he allowed the costs on the scale of the Superior Court so far as regarded the proceedings in the Queen's Bench: but that, so far as regarded the trial in the county court, he allowed only county court costs, according to the scale of *738] costs settled by the county court judges and approved *of by the Lord Chancellor under stat. 19 & 20 Vict. c. 108, s. 33. The Master further stated that he had taxed the costs in the same way in a cause of *Parsons v. Pearee*, an action brought in the Queen's Bench and sent for trial in the county court, in 1857; and that a summons to review that taxation had been taken out, and dismissed by Coleridge, J.

C. G. Merewether, in this Term, obtained a rule calling on the plaintiff to show cause why the Master should not be at liberty to review his taxation.

T. Bell now showed cause.—The sum claimed in this action having, by the payment into Court, been reduced to a sum not exceeding 50*l.*, Erle, J., under sect. 26 of stat. 19 & 20 Vict. c. 108, has ordered the cause to be tried in the county court. A taxation on the scale of the Superior Courts is ordinarily on a judgment recovered in such Courts. The Judge who made the order might, by sect. 26, have imposed the terms that the taxation should be on the scale of the Superior Courts: but he has not done this; and it does not appear that he was asked to do so. In the scale of costs fixed by the county court judges, and allowed by the Lord Chancellor, under sect. 33, and which came into operation on 1st November, 1856, it is directed that "costs in actions under 19 & 20 Vict. c. 108, s. 23, shall be taxed according to the scale of taxation used in the Court of Queen's Bench, so far as it is directly applicable; and where it is not so applicable, the principle of that scale shall be followed." (a) Sect. 23 relates to actions which are tried by *739] agreement of parties in the county court, *but could not be tried there without such agreement: and the mention of this section shows that cases tried under sect. 26 are not to be taxed according to the scale of the Court of Queen's Bench, but according to the scale of other causes under sect. 33. The proceeding, of which the costs are now in question, having taken place in the county court, sect. 33 must regulate the costs; that section applying to "proceedings in the county courts, in actions where the debt or damage claimed exceeds 20*l.*." By sect. 34, "with respect to such proceedings as are specified in the last preceding section, all costs and charges between party and party shall be taxed by the registrar of the Court in which such costs and charges were incurred, but his taxation may be reviewed by the judge of the court, on the application of either party; and no costs or charges shall

(a) Pollock's Practice of the County Courts, &c., ch. 17 (p. 165, ed. 3.)

be allowed on such taxation which are not sanctioned by the scale then in force." Now it is true that this section applies only to costs taxed by the registrar of the county court, whereas the costs now in question are taxed by the officer of this Court. But that does not affect the question as to what scale the Master of this Court shall use in his taxation. The object of sending the case to the county court, under sect. 26, could not have been to get the case better tried: it was to save expense.

C. G. Merewether, contra.—The Master of this Court can have nothing to do with the scale of the county court. [Lord CAMPBELL, C. J.—He is taxing a proceeding in the county court.] It is not, properly speaking, a proceeding in the county court at all. [CROMPTON, J.—For some purposes, at least, it seems to be so. There *would [*740 be county court process.] The scale framed under sect. 33 manifestly applies only to cases where the original and exclusive jurisdiction is in the county court: it could not have been intended that the county court judges were to dictate the rule of taxation to be adopted by the officer of this Court. The plaintiff, as the event shows, might have brought his action in the county court: he chooses to go to the Superior Court. Under sect. 26 the county court acts only as the minister of this Court. The expense has been, in many particulars, increased by the action having been commenced here. [COLERIDGE, J.—Such considerations would be very properly submitted to the Judge, as affecting the terms on which he would send the case for trial, under sect. 26. Lord CAMPBELL, C. J.—The circumstance that terms may be applied for, when the order is made, seems to me to furnish an answer to all the defendant's argument. ERLE, J.—The Judge thinks that the cause is one that should be tried at the county court: the presumption is that the county court costs of trial are the proper ones.] The reason for the order may be that so many witnesses reside near the place of trial: the very circumstance of the multiplicity of witnesses lengthens the proceedings. The Master can, at the utmost, treat the county court scale only as adjunctary to his own scale of taxation; he is not to be bound by it. The defendant, had the case gone on here, would have been entitled to the costs of an action brought for a sum exceeding 20*l*. And this Court never parts with its jurisdiction as to costs. The case is not like one in which the parties, under sects. 23 or 25, go to the county court by mutual agreement.

Lord CAMPBELL, C. J.—I think the defendant is *entitled to [*741 such costs only as the law has provided. As to the proceedings connected with the trial in the county court, the plaintiff has a right to have them taxed according to the scale provided for the county court. It is admitted that the case was properly tried under the Judge's order: that order is silent as to costs: either party might have applied for terms; but both sides were silent: and the Judge had no reason for seeing that the application of the county court scale would be otherwise than just. The Master, therefore, very properly, in taxing the costs of the proceeding in the county court, looked to the scale of costs in county court trials. It appears that the same point has arisen before my brother Coleridge, and was similarly decided by him.

COLERIDGE, J.—I am of the same opinion as on the former occasion. I think that we are to consider that the object was to regulate the costs

in analogy to the County Court Act, which has provided against injustice by enabling the Judge to send down a case to be tried by the county court. He has power to impose such terms as may appear to him reasonable: if no terms are imposed, we are to assume that the Judge thinks it proper that the case should be tried according to the county court scale. No representation was made to him for the purpose of inducing him to impose terms. The county court scale was therefore the right one. It would be wrong to say that the Master here taxes in the character of an officer of the county court: he only uses the county court scale as his guide. The case is quite free from hardship.

*742] ERLE, J.—I am clearly of opinion that this power was *given to the Judge, not merely that the order might meet the opportunities and convenience of witnesses, but also with a view of saving expense. When the order says nothing as to costs, I think the presumption is that the Judge means the costs to be on the county court scale. Where there is any hardship, as where there are fifty witnesses and the only reason for the order is that they are on the spot, it might be very reasonable for a Judge to say that the order should only be made on the terms of paying the costs on the higher scale. That case is exceptional.

CROMPTON, J.—I cannot see that the Master has done wrong. I think that he might, with the authority of my brother Coleridge's judgment, very fairly use the county court scale. Mr. *Merewether* presses upon us that that scale has here been treated as imperative upon the Master: but that is not so; the costs are awarded by the Superior Court: many matters in the county court would have no application here. There is here no particular hardship. The order is not made without each party being heard: if it is erroneous, parties may come here and object. The course here taken appears to me the most convenient one.

Rule discharged.

*743] *The QUEEN v. The Vestry of ST. MARY, ISLINGTON.
June 11.

An unfinished road (in a parish mentioned in Sched. (A.) of the Metropolis Local Management Act, 18 & 19 Vict. c. 120), containing inhabited houses along part of it, communicated, at one end only, with another road containing houses placed singly at long intervals. The soil of such unfinished road was private property; and the road itself had not been dedicated to the public.

The vestry of the parish refused to light the road under sect. 130. On a motion for mandamus to compel them to do so, this Court discharged the rule, on the ground that the vestry were not bound to treat the road as a street under sects. 130, 250.

BEASLEY, in this Term, had obtained a rule calling on "the vestry of the parish of St. Mary, Islington, in the county of Middlesex, to show cause why a writ of mandamus should not issue, directed to them, commanding them to cause a certain street within the said parish, called Blenheim Road, to be well and sufficiently lighted with gas, and for that purpose to set up and maintain in the said road a sufficient number of lamps."

From the affidavits on both sides it appeared that the road in question

would, when finished, communicate at both ends with the Hornsey Road, which was not a street with a continuous row of houses, but contained houses at wide intervals, which houses were separated by open spaces and fields, and the nearest of which was more than one hundred yards from any house in the said Blenheim Road. Up to and at the time when the rule *Nisi* was obtained, there was a thoroughfare from one end only of the said Blenheim Road to the said Hornsey Road, the other end being unfinished. The soil of the said Blenheim Road was private property. No road or highway over the same had been given or dedicated to the public; and the said road might be closed to the public at any time. Several houses had been built in the said road, of which some were still unfinished, and some had been inhabited for more than a year, and had been assessed to the poor-rate.

**Overend* now showed cause.—The road is not a “street” [744 which the vestry are bound to light under sect. 130 of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120. That section enacts that “every vestry and district board shall cause the several streets within their parish or district to be well and sufficiently lighted, and for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every such street, and shall cause the same to be lighted with gas or otherwise, and to continue lighted during such times as such vestry or board may think fit, necessary, or proper.” The parish of St. Mary, Islington, is included in Schedule (A.) to the Act, and is therefore a “parish” within the meaning of the interpretation clause, sect. 250; but the road in question is not a “street” within the meaning of that section, which provides that “the word ‘street’ shall apply to and include any highway (except the carriage-way of any turnpike-road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage.” The section is not intended to include a road of which the soil is private property, and which is unfinished, and not dedicated to the public. The vestry are not bound to take to it until it has become a street in the statutory sense, and has been presented to the public as such, in a reasonable state of completion and repair.

Beasley, contra.—The road may not be a highway; but it clearly comes within the terms “road,” “lane,” or “footway;” and therefore the Act makes the lighting imperative upon the vestry.

**Lord CAMPBELL, C. J.*—If we thought that the vestry had refused to perform an absolute duty imposed upon them by the [745 statute, we would exercise our authority, and grant a mandamus. But no such case for our interference has been made out: the evidence, indeed, is the other way. The vestry are entitled to refuse to light a road which, like the one in question, does not come within the reasonable limits which fix the meaning of the word “street.” I do not say that the mere refusal of the vestry to accept the dedication of a road would prevent it from being a street within the meaning of the Act; if that were so, the vestry might always, by such refusal, avoid repairing or lighting. But they are certainly entitled to exercise some amount of discretion in deciding what is, and what is not, a street within the Act: and we think that their decision in the present case was correct.

COLERIDGE and *ERLE, Js.*, concurred.

CROMPTON, J.—It is not at all clear that this is a street within the meaning of the Act. If it were, an imperative duty to light it would be cast upon the vestry. But the question is one of definition; and the facts stated in the affidavits are not, in my opinion, such as to render the road in question a street within the meaning of the Act. That being so, we ought not, I think, to interfere. Rule discharged.

***746] *ISABELLA HALL v. GEORGE WRIGHT. June 11.**

Action for breach of promise of marriage, averring the promise to be to marry within a reasonable time.

Plea, that defendant, after the promise and before the breach, became afflicted with disease occasioning bleeding from the lungs, and by reason of such disease became incapable of marriage without great danger to his life, and therefore unfit for the married state, of which plaintiff before action had notice. Issue thereon. The jury found all the averments of this plea in favour of the defendant, except the averment of notice, which they negatived.

Held, in the Queen's Bench, by Lord Campbell, C. J., and Crompton, J., that the plea was not sufficient, at all events without this averment.

Held by Wightman, J., and Erle, J., that it was sufficient.

The junior Judge having withdrawn his opinion, and a rule to enter the verdict on this plea for the plaintiff having been discharged:

Held, in the Exchequer Chamber, on appeal, that the plea was no answer to the action. Per Williams, J., Martin B., Crowder, J., and Willes, J. Dissentientibus Pollock, C. B., Bramwell, B., and Watson, B.

DECLARATION on an agreement between plaintiff and defendant to marry one another within a reasonable time. Averment: that a reasonable time had elapsed, and plaintiff had always been ready and willing to marry defendant, whereof he had notice. Breach: that defendant neglected and refused to marry plaintiff.

Pleas. 1. Non assumpsit. 2. Rescission before breach. 3. That, after the agreement and before any breach thereof, defendant "became and was, and thenceforth hitherto has been and still is, afflicted with dangerous bodily disease, which has occasioned frequent and severe bleeding from his lungs, and by reason of which disease defendant then became and was, and from thenceforth hitherto has been, and still is, incapable of marriage without great danger of his life, and therefore unfit for the married state: whereof the plaintiff had notice before the commencement of this action."

Issue on the several pleas.

On the trial, before Erle, J., at the London Sittings after Michaelmas Term, 1857, the jury found the first and second issues for the plaintiff, *747] and the third issue *for the defendant, except as to the allegation that the plaintiff had notice before the action, which they negatived; and they assessed the damages at 100*l*. The learned Judge thereupon directed the verdict to be entered for the defendant on the third issue, with leave to move to enter the verdict for the plaintiff, with 100*l*. damages.

M. Chambers, in the ensuing Term, obtained a rule calling on the defendant to show cause why the verdict should not be entered for the plaintiff on the third issue, for 100*l*., on the ground "that the plea is bad, and that averment of notice is material, and should have been

proved," or why judgment should not be entered for the plaintiff for 100*l.* damages, notwithstanding the verdict on the third issue.

In last Term, (a) Sir *F. Kelly*, Attorney-General, *Edward James*, and *John Henderson* showed cause; and *Montague Chambers* and *Mellish* were heard in support of the rule. The arguments used and the authorities cited sufficiently appear in the judgments in this Court, and in the argument and judgments in the Court of Exchequer Chamber.

Cur. adv. vult.

The learned Judges, differing in opinion, now delivered judgment seriatim.

CROMPTON, J.—The declaration in this case was upon a promise to marry within a reasonable time in that behalf, and averred the lapse of a reasonable time, and that the defendant neglected and refused to marry the plaintiff.

*The defendant pleaded, amongst other things, that, after the agreement and before any breach, he became and was, and thenceforth hitherto has been, and still is, afflicted with dangerous bodily disease, which has occasioned frequent and severe bleedings from the lungs, and by reason of which disease he then became and was, and from thenceforth hitherto has been, and still is, incapable of marriage without great danger of his life, and therefore unfit for the married state: whereof the plaintiff had notice *before the commencement of the action*. [748]

On the trial, the jury found a verdict for the plaintiff on the general issue, with 100*l.* damages, and found all the allegations in the above special plea for the defendant, except the notice, which they found had not been given.

On this finding, the verdict on the special plea was entered for the defendant, with leave for the plaintiff to move to enter the verdict on that plea for her. A rule having been granted for that purpose, and also for judgment *Non obstante veredicto* on the special plea, the case was argued before us in the course of the last Term.

I regard this plea as one in confession and avoidance; and I think it bad, as not showing a good excuse for not performing the promise of the defendant. I do not think that the meaning of the plea is, as was suggested in the argument, that the defendant had become incapable of procreation; the averments only appearing to me to go to the extent of showing that he would incur danger to his life from the consequences of performing the functions of marriage. Nor do I think that the plea means that he could not undergo the marriage ceremony without danger to his life; the statement that he was **therefore* unfit for marriage appearing to me to give a different meaning to the averment [749] that he was incapable of marriage from that of his being incapable of going through the marriage ceremony.

Taking what appears to me to be the fair meaning of the allegations, that the defendant would have incurred great danger to his life from the usual consequences of marriage if he had performed his contract, it remains to consider what is the effect of such a state of things intervening after the promise and before the breach.

It is not necessary to decide how far a personal contract of this nature may be excused by becoming impossible, as no impossibility is alleged. Where a contract depends upon personal skill, and the act of

God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused, and his death might also have the same effect. It was argued, on the part of the plaintiff, that, even if the performance of such a contract as the present was rendered impossible by the act of God, still the defendant must pay damages for the breach of contract. In the view I take of the case, however, it is not necessary to decide this question, nor another question, which was much debated, as to whether the party becoming impotent would excuse him from performing the contract, if he chose to elect not to perform it. I certainly entertain great doubt whether, under circumstances of so painful a kind intervening, the man as well as the woman might not have a right to put an end to the contract: but I cannot think that the mere fact of not being able to perform the functions of marriage without danger to life, of itself, puts an end to the contract. It certainly gives the woman, and perhaps

*750] *the man, a right to terminate the contract: but I do not think that, as far as regards the man, it can affect his obligation further, at most, than by giving a right, or option, or election, of rescinding the contract. Even in the case of a discovery of the unchastity of the woman, the man seems to me only to have the option of rescinding the contract. Cases have occurred, and may occur, where the lover has still clung to the contract, although satisfied of the want of chastity of his mistress. In such cases the state of the party does not seem to me to put an end to the contract, though it may, very probably, give a right to rescind it. There is nothing in the present case at all inconsistent with the facts being that the plaintiff and defendant, on discovering the state of the intended husband, may have talked over the matter, and have agreed that, in the state of their affections, and under all the circumstances, it is the best and happiest thing for them to be united. The danger would naturally appear to them diminished; and they may have wished to take the chance of recovery and happiness; and both may have wished that, if death were to occur, they might have been united, so that the lady might have remained the widow of her husband, perhaps with all the advantages of position he may have been anxious to secure to her. Suppose such to have been the case here, and no rescission or notice of terminating the contract to have been given, but that the plaintiff, having no notice, proceeds with all the preparations, and in all the expectation of marriage, and is deserted at the altar, can it be said that such a refusal is justified? The plea must, according to the rules of pleading, justify every refusal which might be proved, or show what the refusal was, and justify that refusal. Here the refusal may have proceeded

*751] from a *perfectly distinct cause, as there seems reason to suppose, if we could look at the evidence, that it did in this particular case: and, if any such temporary refusal as suggested was meant, the plea ought to have shown it. But I very much doubt whether a not marrying at any particular time, from an acute illness or other similar cause, would be a refusal within the declaration. It was said, indeed, that the plea amounted to a traverse of a reasonable time having elapsed. It seems to me very inconvenient to allow the parties to turn round and treat a special plea like the present, apparently in excuse, as a plea in denial; and I do not think that this plea has any reference at all to the time; but, even if it had, it does not seem to me to justify the absolute

refusal which may have been the meaning of the declaration. Such a refusal may, consistently with this declaration, have been a disclaimer of her at the altar, or an absolute refusal ever to marry her, or even the marriage with another woman; and the plea, to be good, must be a good answer in omnibus. Besides, the plea cannot, in my opinion, be treated as a mere denial of a reasonable time having elapsed, as, to give it such a construction, it should appear absolutely inconsistent with a reasonable time having elapsed; whereas many states of circumstances might be put, consistent with the averments in the plea, and at the same time consistent with the fact of a reasonable time having elapsed, as, for instance, the state of facts I have adverted to before, of the parties having chosen, not to rescind, but to continue, their engagement.

I am of opinion that the plea must be taken, therefore, as one confessing a refusal, and attempting to excuse it. In my opinion, to make it a good plea, it should, at all *events, have gone on to state [*752 that the defendant had elected to rescind the contract on the ground of his state, and given the plaintiff notice of such rescission before the breach. The notice alleged before the commencement of the action, after the breach, clearly can be of no avail. This opinion is, as I have before remarked, quite consistent with its being a defence to such an action that there was a temporary inability, or other event affording a sufficient reason for not marrying at any particular time, as, for instance, if the defendant alleged that the supposed refusal was the not marrying at a particular time when he was ill of a fever and so prevented, for the time, from marrying; this would be good, either as showing that there was no refusal within the declaration, or that there was a good excuse for the particular delay or alleged refusal. The present plea appears to me to assume that the contract was necessarily put an end to by what had occurred, whereas I am of opinion that the facts as pleaded only, at most, gave the defendant the right to put an end to the contract on the ground in question. I think, therefore, that the plea is bad: and, if so, as an allegation in the bad plea, that of notice, was not proved, the plaintiff is entitled to have the verdict as well as the judgment on the plea entered for her, according to the well known distinction that, where there is a good plea, if so much as will support the defence is proved, the defendant is entitled to the verdict, though unnecessary allegations are not proved; but, when the plea is bad, the plaintiff is entitled to the verdict unless every allegation is proved.

I think, therefore, that our judgment should be that the verdict and judgment on the special plea should be entered for the plaintiff.

*ERLE, J.—In this case it is material to define the question [*753 raised by the plea. The declaration alleges a promise to marry within a reasonable time, and a refusal after that time elapsed. The plea alleges that, before any breach of the promise, the defendant was afflicted with dangerous bodily disease, which had occasioned frequent and severe bleedings from the lungs, and by reason thereof the defendant was incapable of marriage without great danger to his life. This plea was proved, and a verdict thereon entered for the defendant, although notice to the plaintiff was not proved. The motion is either for judgment Non obstante veredicto, upon which all intendments within

the allegation are to be made in support of the plea, or to enter the verdict for the plaintiff, on which the evidence by which the plea was proved is to be considered; but the effect of either process is the same. The breach in the declaration is confessed and avoided by the facts in the plea and on the evidence. The plea denies that there has been any breach of the contract: it alleges that what would have been reasonable without the facts in the plea with them is unreasonable, and that with them the refusal alleged by the plaintiff is justified. The notion that the plea refers to sexual intercourse, and raises the question whether a man is released from a contract to marry by reason either of a temporary or an absolute incapacity for such intercourse, is certainly a mistake, if the evidence is regarded, and in my opinion is a mistake if the allegations are regarded. The pleader has avoided terms of anatomy and nosology, and confined himself to facts capable of direct proof; and the plea is clearly wide enough to admit evidence that the defendant was in *754] a state of consumption, when death was closely imminent, *and would probably be immediate, if the patient was disturbed by strong emotion.

The plaintiff contends that a contract to marry is not subject to implied conditions peculiar to itself; and that a reasonable time for marrying is to be measured by the lapse of time, and not by the circumstances of each party; and that, when the time is come, the woman has a right either to a husband or to damages in lieu thereof; and that the fatal consequence of the marriage to the husband is either immaterial to the wife, or a ground for greater damage, as a widow may get more of her former husband's assets than a wife.

But there is no authority to support this view; and there seems to me to be much reason and authority against it. A contract to marry has some peculiar incidents arising from its nature. The contract has been held to be avoided by the immorality of the plaintiff, whether man or woman; per Lord Kenyon, *Foulkes v. Sellway*, 3 Esp. 236; per Abbott, C. J., in *Irving v. Greenwood*, 1 C. & P. 350 (E. C. L. R. vol. 12): by brutal and violent manners and threats of ill usage by the man; per Lord Ellenborough, *Leeds v. Cook*, 4 Esp. 256; by the bad character of the man; per Gibbs, C. J., in *Baddeley v. Mortlock*, 1 Holt's N. P. C. 151 (E. C. L. R. vol. 3): by such ill health as an aggravated abscess on the breast of the man; per Lord Kenyon in *Atchinson v. Baker*, 2 Peake's N. P. C. 103. All of these Judges have assumed that the purpose of the contract was comfort in cohabitation, and that some causes of probable misery rendered it void. The French law, according to Pothier, admitted ill health to a certain degree to avoid the contract. *755] There are cases of bodily disease and moral *disease. There is no doubt that intellectual disease would also avoid it, as the marriage would be null if the mind was unsound. It has also been held that the cause of action for breach of promise of marriage dies with the person and cannot be enforced by the executor: *Chamberlain v. Williamson*, 2 M. & S. 408 (E. C. L. R. vol. 28). The principle to be deduced from these cases seems to me to be, that a contract to marry is assumed in law to be made for the purpose of mutual comfort, and is avoided if, by the act of God or the opposite party, the circumstances are so changed as to make intense misery instead of mutual comfort the probable result of performing the contract.

Within this principle the plea here is a valid defence. The near approach of death by a fatal disease precludes any hope of personal comfort from cohabitation: and, if death is knowingly hastened thereby, each party, by performing the contract, might incur the criminal guilt of intentionally causing death. Thus far I have considered the case as if the contract had been to marry on a given day, and on that day the defendant did not marry, being prevented by dangerous illness. But the promise here was to marry in a reasonable time: and, on such a promise, the circumstances of each party are to be considered in deciding when the reasonable time has arrived. The test lies not in the number of days, but in the reasons that produced the delay originally, and the alteration in the situation of the parties when the time is supposed to have arrived. On such a contract, it is in the extreme unreasonable to say that the time for performing it is come when immediate death would be a probable consequence of doing so, and when, if delay was granted, either health might be restored or the release by death *obtained. If the defendant was confined by a dangerous wound from which he might recover if he rested awhile [*756 undisturbed, it seems to me certain that he would have a right to some delay; and, whether the wound in the lungs be by a deadly weapon or a deadly disease, if the consequences to health are the same, the right of the party to an extension of the time ought to be the same.

I have taken the plea as if notice had not been averred; and I am of opinion, for the reasons above given, that the defendant is entitled to succeed on this defence, although he gave no notice of his state before this plea was pleaded.

WIGHTMAN, J.—This is an action for breach of promise of marriage. It was alleged in the declaration that the defendant promised to marry the plaintiff within a reasonable time; that such time had elapsed, but that the defendant refused to marry her.

The defendant pleaded that, after the agreement and before the breach, he became and was, and continued to be down to the time of the plea pleaded, afflicted with a disease by reason of which he was incapable of marriage without great danger to his life, and that he was therefore unfit for the married state; whereof the plaintiff had notice.

Upon the trial, the allegations in the plea were proved to the satisfaction of the jury (with the exception of the allegation of notice, which was not proved); and the verdict was found for the defendant upon that plea. The defendant admits by his plea that he did promise the plaintiff to marry her within a reasonable time, and that, at the expiration of a reasonable time, he refused to marry her: but he alleges, as a sufficient reason for *his refusal, and the jury have found that his allegations are true, that, after the promise, and before and at the time [*757 of his refusal, and down to the time of pleading, he became afflicted with a disease which rendered him incapable of marriage without great danger to his life, and that he was therefore unfit for the married state. It is unnecessary to inquire what may or may not be necessary physical qualifications for the married state; for the jury have found that he could not enter into the married state without great danger to his life, and that he was therefore unfit for marriage.

The question is, Whether this plea, proved as it is to the satisfaction of the jury, shows a sufficient excuse for the non-performance of the

promise to marry as alleged in the declaration. Is a man bound by law to fulfil a promise to marry, which, by reason of circumstances occurring since the promise, and by no default of his, cannot be fulfilled without great danger to his life? If the performance of the promise had become impossible by the act of God, it would have been an excuse for non-performance: but, in the present case, the performance of the promise is not alleged to be, not is it, impossible, but only highly dangerous to the life of the person promising.

The nature of the contract to marry is such that it seems only reasonable that, if, from disease subsequently intervening, it cannot be fulfilled without great danger to the life of one of the parties, its performance should on that ground be excused. Such a disease, as long as it exists, would, I think, be a "just impediment" to the marriage.

The plea does not amount to a rescinding of the contract by the defendant: nor is it an attempt to rescind *it; as he may recover, *758] and be able to perform it: but it shows a state of circumstances existing down to the time of plea pleaded, which, he says, justifies the refusal to marry as stated in the declaration. The want of notice does not appear to me to be material.

Some old authorities were referred to upon the argument, and, in particular, a case of *Lawrence v. Twentiman*, 1 Roll. Abr. 450, *Condition* (G), pl. 10, in which it was held that, if a man covenant to build a house before a certain day, and the plague breaks out in the place where the house is to be built before the day, and continues until after the day, the covenantor is excused from the performance of his covenant at the day; for the law, it is said, will not compel him to venture his life for it, but he may do it after. There is also a case of *Atchinson v. Baker*, 2 Peake's N. P. C. 103, reported in Peake's Additional Cases, in which Lord Kenyon is said to have held that bodily infirmity arising after the contract is a good reason for either of the parties to break it off.

Upon the whole, therefore, I am of opinion that our judgment should be for the defendant.

LORD CAMPBELL, C. J.—In this case I begin with considering the nature of the defendant's third plea, and what it must be understood to allege. This plea appears to me to be pleaded, not in excuse or suspension of the performance of the promise to marry, but, admitting a breach, to be pleaded in discharge of the promise; nor does it, in substance, allege that the defendant could not, without danger to his life, go through the ceremony of marriage, but only that he could not without danger to his life perform the duties of marriage.

*A contract of marriage, like any other contract, may be *759] shown to be void on the ground of fraudulent misrepresentation or fraudulent suppression. This contract of marriage, likewise, has peculiar incidents, by reason of which the performance of it may be excused. If, subsequently to the contract, the woman has been guilty of incontinence, the man, at his choice, is excused from the performance of his promise, which was given under the implied condition that the woman should continue chaste. So, if, by bodily disease, it should become impossible for him, without danger to his health, to go through the ceremony of marriage at the appointed day, giving reasonable notice of this to the woman, or showing some thing whereby notice might be excused, he might justify the postponement of the performance of his

promise. So, if, by mental disease, he had become incapable of giving assent in the celebration of the marriage, the woman certainly could maintain no action for a breach of the contract. But here the defendant does not seek to excuse himself for refusing to marry the plaintiff within a reasonable time, giving her notice of the temporary impediment, but considers the contract as ipso facto at an end by his supervening bodily incapacity. His plea would, I think, have been proved by evidence that, at the time when he ought to have married the plaintiff, he had become unfit for the procreation of children without danger to his life. The question, therefore, seems to arise, Whether, if, subsequently to a contract to marry, one of the parties, by bodily disease, becomes unfit for the most important duty of marriage, the procreation of children, the contract to marry is thereby dissolved, so that the party so rendered unfit, being sued for a breach of the contract, may establish a *defence by simply alleging and proving the supervening unfitness. [*760

In support of the affirmative of this proposition, there certainly is the high authority of Pothier, one of the most celebrated of modern jurists; who, in his *Traité du Mariage*, part 2, ch. 1, art. 61, says: "I am discharged from a promise to marry" ("de l'engagement des fiançailles," understood in France to be a promise to marry made in the presence of a priest), "not only when there happens to the person to whom I am engaged something which, could I have foreseen it, would have prevented me from entering into the engagement; but, still further, I am discharged when something happens to me which, could I have foreseen it, would have prevented me from entering into the engagement. For example, if I become afflicted with some disease which does not permit me to enter into the state of marriage without the risk of injuring my health, as if I become consumptive" ("pulmonique"). According to this doctrine, the party who so becomes unfit by a tendency to consumption has a right to consider the contract dissolved, the other party wishing the marriage ceremony to be performed; and, the defendant's third plea being sufficient without the allegation of notice, that allegation need not be proved. But the continuation of the same section destroys the authority of Pothier, by showing that the law of France upon this subject is entirely different from that of England. For, having said, "if I become consumptive," he adds: "or if it be any other disease which disqualifies me from gaining my livelihood, or if there happens to me a derangement of my fortune which takes away from me the power of supporting the expenses of the marriage which we had promised to enter *into. In these and other similar cases I am dispensed from keeping my promise of marriage, which I [*761 would not have made if I could have foreseen what would have happened." Pothier himself says, elsewhere, in the same treatise, part 1, ch. 1, s. 4, "*Le commerce charnel n'est point de l'essence du mariage*" (of which he gives an example which it would be irreverent to repeat); and he recognises the maxim of Ulpian, "*Nuptias consensu, non concubitu, facit.*" The only English authority bearing directly upon the question, how far a contract to marry is dissolved by supervening disease, is the dictum of Lord Kenyon in *Atchinson v. Baker*, 2 Peake's N. P. C. 103: "If the condition of the parties was changed after the time of making the contract, it was a good cause for *either party* to break off the connec-

tion." But this was said merely obiter in a case in which the refusal to marry was on the part of the lady, who, subsequently to her promise, discovered that the gentleman had an abscess in his breast, which he had concealed from her: and the dictum in its latitude is not supported by any decision to be found in our books. As yet there has been no decision that for anything supervening after the contract to marry, unfitting either party fully to perform the duties of the married state, the party so unfitted may treat the contract as dissolved, the other still desiring that the marriage ceremony should be performed.

We find the general rule upon this subject laid down in *Paradine v. Jane*, Aleyn 26: "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him." "But when the party by his own contract creates a duty or charge upon himself, he is *762] bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." This is quite consistent with the rule laid down in 1 Rol. Ab. 450, *Condition* (G), pl. 10: "If a man covenant to build a house before such a day, and afterwards the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant for not doing thereof before the day; for the law will not compel him to venture his life for it, but he may do it after." Time not being of the essence of the contract, the existence of the plague might be pleaded in suspension, and in excuse of performance of it on that day: but the contract was not dissolved: and, if the house had not been built in reasonable time afterwards, the covenantor would have been liable in damages. So, if a man be bound in an obligation to A. conditioned to enfeoff B., a stranger, and B. refuse, the obligation is forfeited; for the obligor has taken upon him to make the feoffment.(a) This rule has been often applied to mercantile contracts, as in *Barker v. Hodgson*, 3 M. & S. 267 (E. C. L. R. vol. 30), where it was held that the charterer of a ship, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though, in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the law at the port, and though he could not have had communication without danger of contracting the disorder. Lord Ellenborough, C. J.: "Perhaps it is too much to say that the freighter *763] was compellable to load his cargo; but if he was unable to do the thing, is he not answerable for it upon his covenant?" "The question here is, on which side the burthen is to fall. If indeed the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in

(a) Co. Litt. 209 a.

damages." Is there any reason why this rule should not be applied to the contract of marriage, at least where the ceremony of marriage may be duly celebrated, and the relation of husband and wife thereby constituted between the parties? The counsel for the defendant argued that, in his dangerous state of health, as described in the plea, he is in the same situation as if by disease, or accident, or violence, he had suffered mutilation. In that case he certainly could not have maintained an action against the lady for refusing on that account to marry him. But I am by no means prepared to say that, if she had desired to be married by him and he had refused to marry her, he would not have been liable to an action. By such a marriage she could not have become the mother of children; but she might nevertheless have been affectionately attached to him, and might have innocently desired to enjoy the consortium vitæ with him; she might have obtained rank and station in society as his wife; and, as his widow, she might have been dowable of his lands. The defendant suggests the *impossibility of entering [*764 into the married state under such circumstances; but he may well pay damages for refusing to do so.

If the third plea could be considered as in excuse only, without treating the contract as dissolved, I am of opinion that it is bad for not averring that, before or at the expiration of the reasonable time within which the marriage ought to have been solemnized, the plaintiff had notice of the defendant's dangerous state of health which constituted the impediment, or at least alleging some reason (as from the suddenness of the illness which overtook him) why he did not give her notice. Without any notice to the plaintiff of the defendant's illness, it may not improbably have happened that, when the time for the celebration of the marriage approached, she made all usual and becoming preparations for her change of condition; and, attired as a bride, she may even have expected him at the altar to fulfil his vow. The plea merely alleges that the plaintiff had notice *before the commencement* of the action; and the jury found that no such notice had been given. Indeed he could not have given her notice; for, according to the evidence, he was not aware of his danger; and he must have refused to perform his contract for some other reason.

Upon the whole, I am of opinion that the action is maintainable; that the plea is bad; that the defendant has not proved a material allegation in the plea; and that the plaintiff is entitled to the damages which the jury have awarded to her.

The Court being thus equally divided, the junior Judge formally withdrew his opinion. Rule discharged.

*IN THE EXCHEQUER CHAMBER. [*765

ISABELLA HALL *v.* GEORGE WRIGHT. [Nov. 26, 1859.]

For syllabus, see antè, p. 746.

THE plaintiff having appealed against the above decision, the case was argued in the Exchequer Chamber in Hilary Vacation, 1859.(a)

Mellish, for the appellant (plaintiff below).—On the record and postea

(a) February 2d and 4th.

it must be taken that the plaintiff, at the expiration of a reasonable time, gave notice to the defendant of her readiness to marry him, and that he did not, before the commencement of the action, give her any notice of his illness. Now the plea does not allege incurable illness. [POLLOCK, C. B.—What is the meaning of the words “unfit for the married state?”] The Judges of the Court of Queen’s Bench interpreted those words in different senses. But the plea alleges only unfitness arising from disease producing bleeding from the lungs, and consequent incapacity for marriage without danger to the life of the defendant. A consumptive patient is frequently deceived as to the state of his health. The contract cannot be avoided by a fact not known to either of the contracting parties. But the plea does not show that even the defendant, when he broke off the contract, knew of the facts alleged. [POLLOCK, C. B.—Where a contract is such that, from its nature, it is subject to implied exceptions, it need not be shown that it was

***766]** made with such exceptions. CROWDER, J.—If a man undertakes to paint a picture, and then becomes blind, is he not within such an exception? Here nothing appears to raise more than an excuse for postponing performance. A man might be taken ill with the scarlet fever on the day immediately preceding the day fixed for the marriage: that might excuse the immediate performance, but would not justify a complete breach of the contract. Suppose a person engaged to sing at a theatre catches cold, so as to incapacitate him from singing, he may be excused from singing while the incapacity continues; but this would not justify his renouncing the contract; and, if he did so renounce, the party with whom he contracted might sue immediately: *Hochster v. De La Tour*, 2 E. & B. 678 (E. C. L. R. vol. 77). The plea is, as Crompton, J., pointed out, in confession and avoidance: it therefore admits an absolute breach: and it must justify all that could be proved under the declaration: and the declaration therefore cannot be understood as merely complaining of a breach at a particular time, nor the plea as pleaded in respect of such limited breach. And the justice of this construction appears from this: that, if the plea had addressed itself to a particular time, the plaintiff might have new assigned. The plaintiff had a right to require that the two should remain in the relation of engaged parties: it is a breach to destroy that relation. In *Wild v. Harris*, 7 Com. B. 999 (E. C. L. R. vol. 62), the record showed that the parties contracted to marry in a reasonable time, and that, at the time of the contract, the defendant was married, which the plaintiff did not know: and it was held that the consideration was sufficient, inasmuch as the plaintiff had engaged to remain single, and that the

***767]** action lay for breach of the contract. Here, whatever right the plaintiff might have to put an end to the contract, the defendant had no such election. Suppose a master to contract to navigate a ship in the English Channel and thence to the West Indies; and that he afterwards finds himself in a state which incapacitates him from navigating to the West Indies, but not from navigating in the Channel: the other contractor may, if he pleases, renounce the contract: but can he not call on the master to navigate in the Channel? The incapacity merely brings the case within the rule laid down in *Paradine v. Jane*, Aleyn 26: a contractor may, by the common law, break his contract; but he must pay damages for doing so. Besides, it does not appear here

but that the defendant brought the incapacity on himself: if so, he cannot set it up for a defence any more than he could set up his having been married to another woman at the time of the contract with the plaintiff, and the consequent inability to perform the contract. [POLLOCK, C. B.—In *Wild v. Harris*, was the action for not performing the contract, or for making it when defendant knew that he could not perform it?] It was for not performing the contract. [BRAMWELL, B.—It would be absurd to say that he had contracted subject to the condition of his not being married.] The law of England differs, as to the marriage contract, from the foreign law: this sufficiently appears from the comment of the Lord Chief Justice on the passage which he cites from Pothier. The law as to contracts in general is shown by *Barker v. Hodgson*, 3 M. & S. 267 (E. C. L. R. vol. 30): the impossibility of performing a contract does not relieve the contractor from paying damages for the breach, though illegality would do so. There are many decisions, on the subject of mercantile contracts, to the same effect. [POLLOCK, C. B.—Suppose the impediment [*768 arose on the part of the plaintiff.] That would furnish an answer to the action. [COCKBURN, C. J.—Suppose the woman broke the contract, on the ground that she had a disease which would make marriage fatal to her, though not one which would make her incompetent for marriage.] Perhaps it might be said that she was not bound to destroy herself: but the excuse must at least be grounded on facts which would afford a valid cause for separation. On the other side, reliance is placed on *Atchinson v. Baker*, 2 Peake's N. P. C. 103. There the defendant, a woman, refused to perform the contract of marriage because she discovered that the plaintiff had an abscess in his breast. The defendant, at her option, might insist on the objection. The decision, however, was simply on the ground of a variance. In 1 Rol. Abr. 450, *Condition* (G.), pl. 10, it is said: "Si home covenant de edifier un maison devant tiel jour, et puis le plague est la devant le jour, et continue la tanque apres le jour, ceo excusera luy del breach del covenant pur non fesans de ceo devant le jour, car la ley ne voilt luy compell a venture son vie pur ceo, mes il doit ceo faire apres;" and for this reference is made to a case of Hil. 8 Ja.: *Lawrence v. Twentiman*, 1 Rol. Abr. 450. It may be doubted whether that is good law. The question was only as to the necessity of performing the contract at the time named: and it appears to have been held that time was not of the essence of the contract; but at common law it is so.

Edward James, contrà.—The contract of marriage is *peculiar; and no analogy is supplied by decisions upon commercial [*769 contracts. Indeed it seldom is made by express words. The question here is, What are the implied and inherent conditions of the contract? Is it not one of those conditions that, if either party becomes, by the act of God or of law, incapable of performing the contract, the performance is excused? The defendant does not ask to be exonerated from the contract: he says that the contract is not to marry under such circumstances. The condition is as much a part of the contract as the condition that the parties shall live. In Co. Lit. 205 b, Lord Coke, after stating that the intent and true meaning of conditions upon which feoffments are made shall be performed, goes on to distinguish them from a "condition of an obligation, recognisance, or such like;" and he

shows that, though an impossibility subsequently arising does not defeat an estate which has been vested by a conditional feoffment,^(a) an obligation is saved by such subsequent impossibility. And the principle appears to be allowed, as applicable to contracts to marry, in the judgment of Lord Campbell, C. J., below. It is also in conformity with the authorities cited below by Erle, J. [MARTIN, B.—A man cannot himself set up as a defence that he is of a brutal temper.] The reason of that is, that he is not allowed to take advantage of his own wrong, and therefore cannot plead such matter: but, if it could be pleaded, it would be an excuse. It is law that a man cannot marry his father's wife's daughter: if a man contracts with a woman whose mother his father afterwards marries, is the contract in force? [WILLES, J.—*770] If you look at Burn's Eccl. L., vol. 2, p. 440, title **Marriage, I.*, you will find that the illegality is only in marrying such a daughter if she is his father's offspring,^(b) in which case the marriage is voidable (though not void, as in the case of marriage with a grandmother): if she is his stepmother's daughter by a former husband, there is no illegality.] There is a fallacy in treating this as a plea in confession and avoidance: no breach is confessed; it is only shown that the conditional contract fails by the failure of the condition. It is said that sexual intercourse is not the only object of marriage; and that is so; in the Digest, lib. 50, t. 17, s. 30, it is said, "Nuptias non concubitus, sed consensus facit:" but it is at least an essential part of the contract. If, after marriage, it turned out that the husband had been throughout incapable in this respect, the wife might not get the marriage dissolved, but have it declared null ab initio. Suppose the woman, after marriage, refused the conjugal rights to the husband on the ground that the exercise of them would endanger her life: there might in that case be a sentence of divorce, according to the ecclesiastical law. It is to be observed here that the plea is not so narrow as an averment of incapacity to procreate: it avers that the defendant is "incapable of marriage without great danger of his life." Can the contract be understood as extending to such a case? [POLLOCK, C. B.—A man may endanger his life by serving his country as a soldier, or by sitting by the bed of a dying friend, or by going up in a balloon. But perhaps you may say that a man is not to attempt his own life under such circumstances that, if the attempt succeeds, it will be self-murder.] It is urged that the party contracting, if he cannot perform the contract, must pay damages *771] for the breach. [POLLOCK, C. B.—The **question is, what is the contract?*] That is so. Suppose a man promises to marry on a given day, and on that day is unable to leave his bed. In *Sparrow v. Sowgate*, 1 (W.) Jones 29, a bond was conditioned that defendant, who had become bail for R. in an action of debt by plaintiff against R., would, if R. was convict in the action, and did not pay the sum adjudged or render himself to prison, pay the sum; and plaintiff recovered against R., who did not pay or render himself: defendant pleaded that R. died after judgment and before any ca. sa. issued; and this was held a good plea on demurrer. In *Williams v. Lloyd*, 1 (W.) Jones 179, plaintiff declared that he delivered a horse to defendant, who promised to redeliver it on request; that defendant had been requested to redeliver.

(a) See *The Earl of Shrewsbury v. Scott*, 6 Com. B. N. S. 1, 178 (K. C. L. R. vol. 95).

(b) See 2 Co. Inst. 684; stat. 25 H. 8, c. 22, s. 3; 28 H. 8, c. 7, s. 11.

but refused: defendant pleaded that the horse died before the request: and this was held a good bar. The passage cited from 1 Rol. Abr. 450 by Lord Campbell, C. J., is allowed by him to be law, though the reason which he gives is questionable. It is not that time is not of the essence of the contract, but that the law will not compel a party to venture his life. Time is of the essence of the contract, as much as in the case of a bond to pay on a certain day, where payment after the day was no defence before stat. 4 Ann. c. 16, s. 12. (He also referred to *Mortimer v. Mortimer*, 2 Hagg. Con. C. C. 310.)

Mellish, in reply.—The rule as to conditions is inapplicable to promises or covenants: the true effect of a condition, properly so called, appears from Com. Dig. *Condition* (B 1). The principle of the decision in *Sparrow v. Sowgate* is that the obligor was bound only to place the obligee in the same position as he *would have been in if R. had been arrested: now the obligee was in the same position as he [*772 would have been in if R. had died in prison. So in *Williams v. Lloyd* the plaintiff was as well off as he would have been if the horse had been redelivered and had afterwards died. The argument on the other side passes over the fact that the defendant confesses that he refused to marry. That is a general refusal to marry in a reasonable time. [BRAMWELL, B.—I understand the plea to mean that the defendant was incapable for an indefinite time.] That seems to be extending its language. [BRAMWELL, B.—If a man were incapable for a limited time only, would that support the plea? WILLES, J.—Perhaps he ought to have pleaded that he did not bring the incapacity on himself.] It is dangerous to refine upon the meaning of a contract so well known to the common law. [WILLES, J.—As early as 10 W. 3 a man recovered large damages against a woman for a breach of promise to marry; and this Court refused to grant a new trial on the ground of excessive damages.(a)]

Cur. adv. vult.

On this day, there being a difference of opinion on the Bench, the learned Judges delivered judgments seriatim.

WATSON, B.—This was an appeal from the judgment of the Court of Queen's Bench, in which judgment was for the defendant.

The question turns on a special plea. The action was for breach of promise of marriage; in which the *declaration alleged that the defendant promised to marry the plaintiff within a reasonable [*773 time, that a reasonable time had elapsed, and that the defendant had refused. The plea was, That, *after making the agreement and before any breach thereof*, the defendant became and was, and thenceforward hitherto has been, and still is, afflicted with a dangerous bodily disease, which has caused frequent and severe bleedings from his lungs; by reason of which disease the defendant then became, and was thence, and hath hitherto been, and still is, incapable of marriage without the greatest danger to life, and therefore unfit for the marriage state: whereof the plaintiff had notice. In the argument at the bar in this Court, and at the bar and on the Bench in the Court below, much discussion took place as to what was the meaning and effect of the plea.

The plea is an excuse: viz. that, before breach, and up to the time of the commencement of the action, the defendant was afflicted by a dangerous bodily disease, and therefore "*incapable of marriage*," and there-

(a) *Harrison v. Cage*, Carth. 467.

fore "*unfit for the marriage state.*" The plea does not properly confess any breach of the promise. This question before us arises after verdict; and every intendment is to be made so as to support the plea if possible. The terms are twofold. "Incapable of marriage" may mean two things, either incapable of going through the ceremony of marriage, or incapable of performing the functions required in the married state. In either view of the case I think the plea good. Certainly these words may be considered to apply to the ceremony of marriage; and then the defendant is not to pay damages by reason of a physical inability. The latter words, "*unfit for the marriage state,*" mean the want of that which, as *774] Lord Stowell expresses it, is a competency "to perform the duties which the married contract enjoins:" *Greenstreet v. Cumyns*, 2 Phill. Ca. Ecc. 10. The words "fit," or "not fit," seem to be the apt words to express this state in proceedings in the Ecclesiastical Court: *Sparrow v. Harrison*, 3 Curt. 16. Marriage according to our law, as decided in the House of Lords, was a contract requiring a religious ceremony to its validity.(a) Now, according to the rubric, the parties are to declare at the altar that there is no lawful impediment to the marriage, and that with reference to the object and purposes of marriage as there stated. This is declared to be the law of the Church. Here the parties in this case could not without a falsehood make such a solemn declaration. It would be no answer to say that, by modern legislation, the parties may marry otherwise than according to the rubric; for we are now declaring what is the contract of marriage. Supposing, this marriage being performed, the wife may at any distance of time, presently or at a future time, have a decree declaring the marriage to be void, it seems to be strange that a man is liable in damages for not doing that which is against law, human and divine. The real ground of my opinion is that this contract is, like many other contracts, subject to conditions incident to their nature; amongst others, that the parties remain in health to undergo the ceremony, and do not become "*unfit*" for marriage, and that the circumstances should not render it contrary to law.

It was conceded, on the argument and in the Court below, that insanity of mind would be an excuse, and that the insane person would +775] not be responsible in *damages. If so, why not insanity of body? In each case, as alleged, he is to answer in damages for not marrying; in each case the marriage is void; *Parmeter v. Parmeter*; (b) in each case it is no act of the defendant, but the act of God. It is not a dissolution of the contract, except at election, such as the man refusing to marry on the score of the want of chastity of the intended wife.

With this view of the plea, it is clear that the allegation of notice was immaterial and need not be proved.

In this declaration it is said the defendant "*refused to marry.*" This is explained by this: that this, by itself, constituted no breach before the defendant's illness; and it shows that before the reasonable time had elapsed he was attacked by the disease. If so, then the reasonable time

(a) See *Regina v. Millis*, 10 Cl. & F. 534.

(b) The reporters have been unable to find this case: the authority referred to is perhaps *Countess of Portsmouth v. Earl of Portsmouth*, 1 Hag. C. Rec. 355.

had not elapsed. The term "reasonable time" refers to health under all the circumstances.

The cases cited in the Court below have little or no application in my view of the case: viz. of *Paradine v. Jane*, Aleyn 26, a covenant to repair a house; or, 1 Roll. Abr. p. 450, pl. 10, to build a house; or, Co. Litt. 209 a, to enfeoff a stranger; or to load a ship; *Barker v. Hodgson*, 3 M. & S. 267 (E. C. L. R. vol. 30). In these and in all like cases the covenantor or promisor agrees to do the acts, or that the acts shall be done, unconditionally and at all events; and for this he is liable if living, or his real or personal representative, as the case may be, having assets. It is clear that in one respect death dissolves the contract to marry: *Chamberlain v. Williamson*, 2 M. & S. 408 (E. C. L. R. vol. 28).

*The performance of such contracts is still subject to be excused by subsequently becoming illegal. [*776

An argument was relied on, that this promise might have been made with the knowledge of defendant's infirmity. To this there are two answers: first, the plea alleges that the infirmity arose after the promise of marriage; secondly, it must from the declaration be taken to be a contract of marriage of the ordinary kind, with all its usual obligations and incidents. If it had been otherwise it should have been so alleged.

I think the judgment of the Court below should be affirmed.

MARTIN, B., then read the judgment of

BRAMWELL, B.—In this case the verdict should be entered for the defendant, if so much of the plea as is proved is an answer to the breach of contract complained of. The averment of notice was not proved; but that is immaterial, unless the plea, with or without it, is bad. It is good if it justifies the breach complained of. It is good, therefore, if it justifies the not marrying (for a refusal to marry is *not* marrying) at the time when, but for the reason alleged, the defendant ought to have married. What are the consequences, whether the contract is rescinded or whether the defendant is liable to marry at some other time, or what else may result, I will advert to hereafter. At present, the question is, Does the plea justify the particular breach alleged? Now the plea alleges that, before and at the time of the breach, the defendant was afflicted by bodily disease which made him incapable of marriage without great danger of his life, and unfit for the married state. The question *was at first argued as though this meant an unfitness for sexual intercourse: but Mr. *James* said it meant, and it appears from the judgment of Erle, J., to mean, not only that, but also an incapacity to bear the fatigue and excitement of the marriage ceremony. It was proved to be true in both its meanings. I think either matter a justification for not marrying. [*777

But it is necessary to examine both; as some seem to consider the plea merely to mean unfitness for the ceremony of marriage, others the other unfitness I have mentioned. As neither fraud nor illegality is alleged, the excuse for not performing the contract must be found in the terms of the contract itself. The plea therefore assumes that it is a term of the contract declared on, that, in the event named in the plea, the defendant should be excused from marrying: and, as there is no reason why such term should be in this particular contract unless it is in all such contracts, the question is reduced to this: Is it a term in an ordinary agreement to marry that, if the man from bodily disease

cannot marry without danger to his life, and is unfit for marriage from the cause mentioned at the time appointed, he shall be excused marrying then? The plea assumes it is. I think it is. Of course I admit that parties might stipulate otherwise; but, if they do not, I think they are implied terms of the ordinary contract.

I quite agree that, where parties can make their own terms, the law ought not lightly to imply any. But there are instances in which it is done from the necessity, or almost necessity of the case; and, if ever it is reasonable to do it, it is in the contract to marry. Consider how it is made, and how it is proved; made without formality, usually without witnesses, perhaps without *the word itself being used, or *778] any word of contract, an understanding between the parties, rather than a bargain; come to, at least very often, in a state when the feelings are much excited; proved by a variety of acts and conduct which assume the contract to exist. It seems unreasonable to deal with it as with a contract for sale of goods or other business transaction, though, no doubt, the same *principle* governs both. "All these contracts ought to be looked upon (as Lord Hardwicke said, in the case of *Woodhouse v. Shepley*, 2 Atk. 535) with a jealous eye." "They are liable to many mischiefs; to many dangerous consequences." Per Lord Mansfield, in *Lowe v. Peers*, 4 Burr. 2225, 2230. These mischiefs and dangers would be greater if the engagement was taken to be unconditional and unqualified. That terms are implied in contracts is admitted. Contracts for personal service, for matters dependent on personal capacity, as to write a book or paint a picture, are conditional on the continuance of the ability, mental or corporeal, to perform them. This very contract to marry has an implied condition that the woman shall continue chaste. Other instances might be given. Similar considerations make me think such conditions, then, as the plea assumes, are to be implied in the ordinary contract to marry. Surely, if a man said to a woman, "I have promised to marry you, and must and will, but will never live with you or treat you as a wife," he would not be offering, but refusing, to perform his contract: *Leeds v. Cook*, 4 Esp. 256. The contract is a contract to marry and perform the duties of marriage. I think it better to recognise what we all know exists, and *779] to assume it exists for a good purpose, than to affect to *ignore it. Besides, there is abundant warranty for so doing. The marriage of an impotent man is null; and two of the three reasons for matrimony given in the marriage service involve the capacity for sexual intercourse. Can it be doubted, then, if death were the *certain* result of the fatigue and excitement of the ceremony, that the defendant would be excused, or that *impotency* supervening on the promise would excuse him? Could he be bound, in performance of his promise, to commit suicide, or go through a ceremony which would be a nullity? But, if the *certainly* of a fatal result would excuse, so would great danger of it. If impotency would, so surely should great danger; if death from the exercise of capacity, more so. I desire to speak with all reserve: but to possess the lawful means of gratifying a powerful passion with the alternative of abstaining or perilling life is indeed to incur a risk of "intense misery instead of mutual comfort:" and it does seem to me, with great respect, a great mistake to lose sight of these considerations, and suppose happiness can be found in such a marriage by the gratifica-

tion of an *innocent* desire to enjoy the consortium vitæ with the man, obtain rank and station as his wife, and be dowable of his lands. Moreover, this is to think only of the woman and not of the man, who might object that her wishes, however *innocent*, were very unreasonable towards him in wishing him to put himself in the temptation of periling his life; and he might even doubt the innocence of such a desire, certainly, of wishing him to go through a ceremony which might be fatal to him.

This suggests the following. If the man is not excused, but bound, is the woman bound in such a case? Impossible, one would think. But, if not, it *must be on account of some implied condition in the contract. It is not as though the man was in default. She could [*780 not refuse to marry, in such a case, on the ground that he had broken his contract by not continuing fit for marrying. For, if so, she might not only refuse to marry him, but maintain an action against him for becoming unfit. That cannot be: he does not thereby break his contract; yet she is excused. If so, so must he be; for, if without default of one party to a contract the other has a right to refuse to perform on the happening of a certain event, it must be assumed, till the contrary appears, that right is common to both. If in such case she could rely on an implied condition to excuse her marrying him, why may not he on one to excuse his marrying her?

The contract to marry has been assimilated to those to which it bears no resemblance. A man contracts to load a ship, and cannot. Well, that is his misfortune; a loss will be sustained by him *or* the shipowner; and it is convenient that, if he puts no condition in his contract, none should be implied, and that, if his contract is unconditional, *he* should bear the loss consequent on *his* non-performance. So of a contract to sell corn. But in the case of a contract to marry, with supervening impotency, there is a loss which *must* fall on *both*, whether the contract is fulfilled or not. It seems to me, then, that sexual intercourse is contemplated by parties who agree to marry as an essential part of their engagement; that inability for it in one party is an excuse for performance by the other; that, where such excuse exists without any default in the disabled party, it is contrary to principle to hold that an option is given to the other; consequently that the right of secession in such case is mutual.

*The authorities are in favour of this view: Pothier, *Traité du Mariage*, part 2, c. 1, art. 7, s. 61. But it is said his authority [*781 is impaired by his adding, as a cause of dissolution, "a derangement of fortune, which puts me out of condition to be able to support the charges of the marriage which we had promised to contract." I own I see nothing unreasonable in this, nor anything very different from our law. People who agree to marry, not having the means, agree with an implied condition to wait till they have them; the legal expression of which is that their engagement is to marry in a reasonable time; and that does not arrive till their means are sufficient. Suppose, after the engagement, poverty falls on them: that is an excuse for not immediately marrying. Is it reasonable that the woman should wait till the man becomes able to maintain her? This reasoning may be wrong: still there is Pothier's authority direct on the question in hand. Then there is the opinion of Lord Kenyon in *Atchinson v. Baker*, 2 Peake's N. P. C. 103,

cited and approved in 1 Parsons On The Law of Contract, 550.(a) *Paradine v. Jane*, Aleyn 26, and similar cases, cited for the plaintiff, are misapplied. They beg this question. No doubt, if a contract made by the parties is unconditional, death or disease is no excuse: but the question in this case is, Whether the contract is not conditional on the continuance of life and health. Why, if the defendant died before breach, could not his executors be liable? The answer is, because he has not undertaken to live. Neither has he to continue competent in health. And the one is as much a condition of matrimony as the other. This disposes of *Barker v. Hodgson*, 3 M. & S. 267 (E. C. L. R. vol. 30). *782] Lord *Ellenborough's remark, "Perhaps it is too much to say the freighter was compellable to load his cargo," does not mean he was excused from so doing; for the plaintiff recovered in respect of the defendant not having done so; the damages were for breach of the covenant to do it. What Lord Ellenborough means I imagine to be: that the defendant was not morally compellable, or would not have had specific performance enjoined. It is to me unintelligible, how, if the man is not bound to perform the contract, he can be liable to pay damages for its non-performance.

But, it is said, notice ought to have been given to the plaintiff. In point of right *feeling* I agree. But the parties here are at *law* with each other. The defendant says, "I have a legal answer to your legal demand." As a rule, a man is not bound to say why; and I see no reason why he should be in this case of a contract to marry. It may be the defendant communicated to the plaintiff, in the most delicate way, an objection to marriage, but refused to say why. If she chooses to go to law with him, as on a bargain, she must abide by rules of law applicable to all cases of bargains and contracts.

I understand the opinion of Mr. Justice Crompton to be rather as above expressed, with this difference. He thinks that, at the utmost, all the defendant was entitled to was to rescind the contract. But, if so, I think the plea good. When is he to rescind? If a contract gives a right to rescind, and fixes no time for rescinding, it need not be done till the time arrives for performance: no previous notice need be given. In truth, such a right to rescind is a right to say "No" when the time arrives for performance. It may be that a person who rescinds must *783] give notice. But when? He does give notice *when he refuses. Is he bound to give it earlier? If so, why? In the not very probable case of the lady going to the altar without previous arrangement, surely he might, if afflicted as the defendant is, barely send word, in answer to an invitation to join her, that he would not. In the more probable case of some previous request, he refuses when it is made. In other words, till he refuses there is no breach of contract; and when he refuses he by so doing gives notice he will not perform. Is he bound to say why? I cannot understand why he is. No doubt, if, after his disability arises, he goes on with the engagement, he may well be bound, as that would be evidence that the original contract was not conditioned as I think ordinary contracts to marry are, or would furnish evidence of a fresh contract.

Further, if it is said that the facts proved only justify a postponement of the marriage, I think the plea good. The plaintiff complains

that the defendant refused. The defendant says, "When I did, I had a sufficient reason." I do not understand the breach to be, "You refused, and refused for ever." I do not understand such a breach in point of law. I do not understand what is meant by a plea "in excuse or suspension of the performance" as distinguished from one "in discharge of the promise." *Hochster v. De la Tour*, 2 E. & B. 678 (E. C. L. R. vol. 75), turns on the relation of master and servant. If I contract to do a thing, and am sued for not doing it, it is a good defence to say the time for doing it has not arrived: and, I take it, it would be a bad replication to say, "True, but you said you never would." See *Avery v. Bowden*, 6 E. & B. 953 (E. C. L. R. vol. 88).^(a) The *plaintiff can only be entitled to recover on these pleadings and proof on the ground that the asserted and proved incompetency [*784 is no ground for refusing to marry when the request so to do is made. I am of opinion it is. In short, the defendant here says: "You complain I refused. I admit it; I did so for a good reason, viz., my performance was conditional on my continuing in a competent state; and I ceased to be so." If the plaintiff meant to say the contract was not so conditioned, she should have given evidence (in my opinion) that the contract in this case was not the ordinary contract to marry. If she meant to say there was a new contract evidenced by the engagement continuing after the disability was known, she should have new assigned. But, if she relies on and proves the common contract only, it is in my opinion a good answer to prove that the defendant, when he refused, laboured under either of the infirmities proved in this case.

If I am to say whether I think the contract ended by such an event, I say I do; and on this ground: that it is so vitally for the benefit of both parties that that should be the agreement between them, that common sense requires it to be so implied. The disability of the defendant, if not incurable, was one of indefinite duration, and of a lasting character. Had it been that he broke a leg, or was afflicted with a fever which disabled him for marriage at the time appointed, I should have thought him not liable to an action for not marrying then, but bound to marry on his recovering. This last consideration seems to me to suggest an argument in favour of the contract being conditional as suggested. For in ordinary contracts, if not liable at the day appointed, a person would not be at another time; but in *this contract it is absurd to suppose that, if a day was named for a marriage and the man broke [*785 his leg, was ill of a fever, lost a parent, or from some other consideration of health or decency could not marry on the day in question, he would either be liable to an action, or wholly discharged from his promise to marry. But the same good sense and convenience which would reject such a conclusion, in my judgment, requires that the contract should be construed with the conditions I attach.

For these reasons, as well as those of Mr. Justice Wightman and Lord Chief Justice Erle, I think the judgment should be affirmed.

WILLES, J.—I am of opinion, for the reasons stated at large by Lord Campbell in the Court below, that the judgment therein given against his Lordship's opinion and that of Mr. Justice Crompton ought to be reversed, and judgment given for the plaintiff for the damages assessed in her favour by the jury, with costs.

(a) In Exch. Ch., affirming the judgment of Q. B. in *Avery v. Bowden*, 5 E. & B. 714.

This is not a case of impotence; and I need give no opinion upon such a case.

The canon law is clear upon the point, that only impotence, permanent and incurable, such as that which results from the loss of one of the necessary organs of generation, constitutes an impediment to marriage, and not that which may be temporary or curable.

The contract in this case is stated by the plaintiff in the declaration, and admitted by the defendant in his plea, to have been in terms an unconditional one: and it is guesswork, not construction, to read it as conditional. Its performance is not impossible; and it is not enough *786] to show, in answer to an action upon a contract, *that its performance is inconvenient or may be dangerous. The delicacy of health, alleged as an excuse, is the man's misfortune, not to be visited, beyond what is inevitable, upon the woman. If either party is to have the option of breaking off the match, it ought to be the woman. The Court have no right to say what is best for her. If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. I do not sympathize with such a woman, if any there be: but this is not a question of sentiment. If it were, I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman even more anxious to marry, in order to be the companion and the nurse, if she could not be the mistress, of her sweetheart.

The judgment for the defendant ought therefore to be reversed, and judgment given for the plaintiff, with costs.

CROWDER, J.—The question in this case is, Whether the plea affords any legal answer to the action: and I am of opinion that it does not.

The declaration is upon a contract to marry, and avers a breach of that contract by not marrying in a reasonable time. The plea, as I understand it, admits a breach as alleged in the declaration, but sets up an excuse for it. And the question to be decided is, Whether that excuse is a legal answer to the action.

Now I think the substance of the excuse alleged is that, in consequence of the defendant's dangerous illness which had supervened since the promise and before the breach, it became very inexpedient and *787] imprudent to *perform the contract, and therefore the defendant broke it. It is quite impossible to construe the plea as alleging any physical impossibility to go through the ceremony of marriage, or any physical incapacity to perform the duties of marriage. Whether, if such allegations had existed, they would have afforded any answer to the action, I do not think it necessary in this case to decide: and I abstain from giving any opinion upon that point.

But I am of opinion that it is no excuse for the breach of a promise to marry, that the performance of the conjugal duties would be attended with danger to the defendant's life. Such a state of illness may make it matter of the greatest prudence on his part to break his contract, and to pay such damages as a jury may award against him for the breach. But, in my opinion, it is no legal answer to the action. I desire to refer to the arguments and reasoning of Lord Campbell in the Court below as conclusive in my mind upon this view of the case. It would be idle for me to repeat them.

I think, therefore, our judgment should be for the plaintiff.

MARTIN, B.—This is an appeal from the judgment of the Court of Queen's Bench, reported in the 27th Law Journal, page 845. The action is for breach of promise to marry. The declaration is in the common form, alleging the promise to marry within a reasonable time. Amongst other pleas, the defendant pleaded that, before breach, he became and was and is afflicted with dangerous bodily disease, which occasioned frequent and severe bleeding from the lungs, by reason of which disease he became and was and is incapable of marriage without great danger to his life, and therefore unfit for the *marriage state; whereof the plaintiff before action (not before breach) had [*788 notice. Issue was joined upon this plea. The cause was tried before my brother Erle; and the jury found that all the averments in the plea were proved except that as to notice. The Judge directed the verdict to be entered for the defendant, giving the plaintiff leave to move to enter it for her. The other issues were found for the plaintiff, and the damages assessed contingently at 100*l*. A rule was obtained to enter the verdict for the plaintiff: and, after argument, the Court were equally divided; Lord Campbell and my brother Crompton thinking the plea bad, in which case, an averment in it not being proved, the plaintiff would be entitled to have the verdict entered for her; my brothers Wightman and Erle thought the plea, as proved, good. My brother Crompton, being the junior Judge, gave way for the purpose of this appeal; and the plaintiff's rule was discharged.

I agree with Lord Campbell and my brother Crompton, and think the plea bad.

The law of England permits an action to recover damages for the breach of a promise to marry; although I am aware that many persons think that such an action should not be allowed. The action is not for a specific performance, a suit which I apprehend no Court in this country could entertain, but for damages for the non-performance of a contract. The plea is one in confession and avoidance: and the facts alleged in it (exclusive of the notice to the plaintiff) are said to excuse or justify the breach. The Judges of the Court of Queen's Bench do not seem to have been agreed as to the exact meaning of the plea: but, to put it in the most favourable view for the defendant, it may be assumed that the promise to *marry involves a promise to con- [*789 summate the marriage, and that the incapacity and danger to life mentioned in the plea has been caused by an inevitable misfortune without any act or conduct of the plaintiff conducing to it.

The general rule upon the subject is, that, when a person by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his conduct: *Paradine v. Jane*, Aleyn 26, cited and acted upon in *Hadley v. Clarke*, 8 T. R. 259, and *Atkinson v. Ritchie*, 10 East 530. See also Com. Dig., *Action upon the Case upon Assumpsit* (G.). And I know of no authority, except it be *Lawrence v. Twentimah*, 1 Rol. Abr. 450, pl. 10, having any tendency to shake it, or to show that such a state of facts as alleged in the plea is an answer to an action for pecuniary damages for the breach of contract to marry. I think it very much better to adhere to the rule than to create an arbitrary exception for which, no doubt, plausible reasons may be given. To admit exceptions of this kind utterly destroys the cer-

tainty of the law, and in my opinion is inconvenient. But, in the present case, what the defendant promised to do was to marry the plaintiff. This he could have done; and it is quite consistent with the averment in the plea that the incapacity and danger to life may have been caused by the defendant's own acts or conduct: and a case will readily suggest itself where, after a promise to marry, an incapacity to consummate marriage and danger to life in attempting to do so might arise, in *790] which it would seem absurd to suppose that damages *could not be recovered. The supposed subject of the plea would be the grossest aggravation of the cause of action. As to *Lawrence v. Twentiman*, 1 Rol. Abr. 450, pl. 10, except it be explicable in the manner suggested by Lord Campbell in his judgment in this case, viz., that time was not of the essence of the contract, or that the law relating to holding intercourse with persons affected by the plague (see stat. 1 Ja. 1, c. 31) made the performance of the contract illegal, I cannot agree with it. It is, no doubt, referred to in several books as authority: but, unless explained as above, it seems contrary to the rule of law. The placitum is to the effect that a man had contracted to build a house before a certain day, but was excused because the plague had broken out, and continued to the day in the neighbourhood: but, it is added, he must build it afterwards. Unless the contract really was to build the house within a reasonable time, or the statute of James made the building illegal because of the existence of the plague in the neighbourhood (in which case the decision was right), the case cannot be sustained. How is it possible to maintain that there could be any obligation to build it afterwards? The builder never contracted to do so; and the common law could not impose such a contract upon him. See *Shepherd's Touchstone*, by Preston, page 174, and *Barker v. Hodgson*, 3 M. & S. 267 (E. C. L. R. vol. 30), which seems to the contrary.

It must be taken that the law deems a contract to marry to be one of pecuniary value: and, assuming that it could not reasonably be expected, under the circumstances stated in the plea, that the defendant should *791] marry the plaintiff, I can see no reason why he should *not compensate her for the breach of the contract. Why should the consequences of the misfortune fall upon her, and not upon the defendant? See Lord Ellenborough's judgment in *Barker v. Hodgson*, 3 M. & S. 267 (E. C. L. R. vol. 30), and the dicta of Lord Holt in *Thornborow v. Whitacre*, 2 Ld. Raym. 1164. For these reasons I think the judgment ought to be reversed.

WILLIAMS, J.—I am of opinion that the plea is bad, and that the plaintiff is therefore entitled to judgment.

It appears to me to be a plea in confession and avoidance; that is to say, the defendant alleges that he is justified in not keeping his promise, because, after making it, he became incapable of marriage without great danger of his life. I am of opinion that, though this is a reason why he should not be compelled to a specific performance of the contract, and a very good reason why he should in prudence prefer paying damages for the breach of his contract to the performance of it, it is no ground for resisting the payment of such damages.

According to the general law applicable to contracts, the plea is insufficient by reason of the rule (cited in Lord Campbell's judgment) as laid down in *Paradine v. Jane*, Ayleyn 26, and which is established by the

authorities collected in Serjt. Williams's note (2) to the case of *Walton v. Waterhouse*, 2 Wms. Saund. 422.

But it is alleged that a contract to marry stands on a peculiar footing, and is subject to implied conditions peculiar to itself. And the authorities certainly afford ground for contending that, if the parties in this case had been reversed, and the present defendant were suing *the present plaintiff on the contract, she might have set up his bodily [*792 inaptitude as a ground for refusing to perform her contract, just as he might have pleaded her corporal inaptitude, or want of chastity, which had supervened or had been discovered since the making of the contract. But there is no authority, that I am aware of, or any good reason, for allowing the one party to set up his or her corporal infirmity or unfitness for marriage, or his or her impurity, in answer to the requisition of the other, who may nevertheless wish for and insist upon the performance. A woman would not be allowed to plead her own want of chastity if she were sued for a breach of promise of marriage, notwithstanding the man might well set it up as an answer if she were to seek to enforce the contract.

But it has been argued that this is not a plea in confession and avoidance, but a kind of circuitous traverse of a reasonable time having elapsed, or a plea merely of matter which suspends the performance of the contract. As to this, I think it enough to say that in this respect I entirely agree in the view which Lord Campbell and my brother Crompton have taken in their judgments.

I will add that this question, though a nice and curious one, is not likely in my opinion to be of any great practical importance. Surely the cases must be very rare where a woman, if informed that the man to whom she has been affianced is in such a state of health as the defendant is alleged to have been, and is requested to excuse on that account the completion of the marriage contract, would insist on the performance of it, or where, if she was so ill advised as to bring an action for a breach of it, a jury could be found who would, under such circumstances, give her more than nominal damages. *But, in the present case, the defendant broke off the marriage without informing the plaintiff [*793 that he had such a ground for wishing to be excused from becoming her husband.

For these reasons I think the judgment of the Queen's Bench ought to be reversed.

POLLOCK, C. B.—After the discussion which this case has undergone, I do not think it necessary to say anything upon the formal or technical parts of the case: but I shall proceed at once to the question as to which a difference of opinion prevails among the members of this Court, and of the Court below: and that is What is the real meaning of a contract to marry within a reasonable time, which is the contract stated in the declaration?

Some learned judges think it is of the same character as any other contract, and that no terms or conditions can be implied by the law: and that, if it be not performed in the terms expressed, the party failing to perform it must pay damages for the breach of it. Other learned Judges think that there are implied conditions or exceptions, and that the matter stated in the plea is one of them; and therefore that the de-

fendant cannot be called upon to pay damages for the non-performance of the contract alleged in the declaration under the circumstances which appear on the whole record.

Now it must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that *794] he shall be alive to perform them: *and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would in my judgment be deemed subject to the condition that, if the author became insane or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death. In truth, the reasonable time has not arrived, if the party contracting to perform the act has been deprived by illness of the means of performing it: but I should decline to put my judgment on that ground; though in this case, and on this record, I think it would be quite sufficient. I prefer putting it on the ground that there is an implied exception, including the state of facts alleged in the plea, and found by the jury to be true.

In the case of the ordinary contract to marry, such as it is presented to the Court by evidence in actions of this sort, I think no one can doubt that the continuance of life is an implied condition. The question then is: Is the continuance of health, of such a state of health as makes it not improper to marry, another condition? I am of opinion that it is. There are conditions to be implied (I think) on both sides in such an agreement. I think every one would admit that it is a condition on the part of the female that she should continue *chaste*, and *perhaps*, more generally (though this is not so clear), that her conduct should not be such as to make a marriage with her improper. I think the test that may be safely applied to ascertain whether any such condition is implied *795] or not is to consider what would be the case *if a man were, after such a promise to marry, to lose by accident or disease the capacity to contract matrimony by becoming impotent. To such a case the decisions about impossibility do not, I think, apply. By the act of God the contract has become void. The man may go through the ceremony of marriage; but he cannot marry: the ceremony would not be binding: it would operate nothing: and the contract to marry is broken by the calamity of his becoming impotent.

It has been suggested that in such a case the woman may be contented with the society of the man, and that the choice ought to rest with her; and that, if she be willing to marry, he must marry or pay damages. I am of opinion that such is not the law. I think, if the man can say with truth "By the visitation of Providence I am not capable of marriage," he cannot be called upon to marry: and I think this is an implied condition in all agreements to marry. I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority.

And I think the judgment of the Court below ought to be affirmed.
 Judgment reversed.(a)

(a) Cockburn, C. J., who had heard the argument in the Court of Exchequer Chamber, had, since then, become Chief Justice of the Court of Queen's Bench, against the judgment of which Court this appeal was brought.

At common law, it is usually said, a covenant to do a particular act, is so far of perpetual obligation, that though its literal performance is rendered impossible, through some unforeseen and unavoidable mischance, the covenantor is not thereby discharged, but remains liable in damages for the breach: *Paradine v. Jane*, Aleyn 26; *Thornborow v. Whitacre*, 2 Ld. Raym. 1165; *Atkinson v. Ritchie*, 10 East 533; *Reid v. Edwards*, 7 Porter 512; *Beebe v. Johnson*, 19 Wend. 504; *Oakly v. Morton*, 1 Kern. 30; *Hande v. Baynes*, 4 Whart. 214; *Piper v. Bavage*, 10 Exch. 73. This rule and its reason are thus succinctly stated in *Paradine v. Jane*: "Where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." Thus a lessee continues liable upon his covenant for the payment of rent, though the premises are destroyed by accident, as by fire or flood: *Smith v. Ankrum*, 13 Serg. & R. 39; *Magaw v. Lambert*, 3 Barr 444; *Hallett v. Wylie*, 3 Johns. 44; *Fowler v. Bott*, 6 Mass. 63; or by the public enemy: *Paradine v. Jane*, Aleyn 26; *Pollard v. Schaffer*, 1 Dallas 210; *Wagners v. White*, 4 Harr. & John. 564; though see in South Carolina, *Bayley v. Lawrence*, 1 Bay. 497. So of a covenant to repair the demised premises, under the same circumstances: *Dyer* 33 a; *Paradine v. Jane*, ut supra; *Phillips v. Stevens*, 16 Mass. 238; *Bullock v. Demmitt*, 6 Term R. 650; though see *Pollard v. Schaffer*, 1 Dallas 210. So as to other contracts. Thus on a covenant to build a bridge

in a substantial manner, and to keep it in repair, the party is bound to rebuild the bridge, though broken down by an extraordinary flood: *Brecknock Co. v. Pritchard*, 6 Term R. 750. So a contract to build a house is not discharged by its destruction by fire, before its completion: *Adams v. Nichols*, 19 Pick. 275; see *Lee v. Wheeler*, 1 Gray 282. So in a case where a contract called for *prime first chop teas*, it was ruled to be no excuse, that no such teas could be obtained in the market, at the time fixed for delivery: *Gilpins v. Consequa*, Peters C. C. 86. So where there is a contract to deliver goods at a certain place within a specified time, performance will not be discharged by reason of a freshet which has obstructed navigation: *Harmony v. Bingham*, 2 Kernan 90. So where a charterer covenanted to send a cargo alongside at a foreign port, it was held to be no excuse, that he was prevented from so doing by the prevalence of an infectious disorder: *Barker v. Hodgson*, 3 M. & S. 267. And in *Clendaniel v. Tuckerman*, 17 Barb. 184, a consignee was held liable for demurrage, though the vessel, while waiting for freight, was capsized by a freshet.

But to this rule there are some apparent exceptions. Thus, when the thing to be done arises from a duty cast upon the party by the law, he will be discharged by the act of God, or of the public enemy: *Keighley's Case*, 10 Coke 139 b; *Coggs v. Bernard*, 2 Ld. Raym. 918; note to *Walton v. Waterhouse*, 2 Wms. Saunders 422; *Reg. v. Justices of Leicester*, 15 Q. B. 92. Again, where the subject-matter of the contract has ceased to exist, by inevitable misfortune, performance will

be excused. Thus where in a lease there is a covenant to deliver up the premises in like good order and condition, and a wood is prostrated by a tempest, the lessee will not be liable, for it is the act of God, and he cannot make the trees grow again: 1 Rep. 98 a; see 2 Ld. Raym. 1165 arg. So a promise to return a horse on request, is discharged by the death of the horse before request: *Williams v. Lloyd*, Sir Wm. Jones 179. So of an obligation conditioned to run a race or pay by a day: Anon. cited 3 Keble 770. So a bond conditioned that A. shall marry B. within two years, is avoided by the death of B. within the two years: *Wood v. Bates*, Sir Wm. Jones 171; and so of a statutory bond for the delivery of an animal, which dies before breach: *Carpenter v. Stevens*, 12 Wend. 589. Indeed, it is laid down, in general, by books of high authority, that where the condition of a bond, after its execution, becomes impossible by the act of God, the obligation itself is gone: Co. Litt. 206 a; Com. Dig. *Condition*, D. 1; 1 Rolle Abr. 449, 450; *Warner or Parker v. White*, 3 Keble 738, 761, 770; *Laughter's Case*, 5 Rep. 21, Cro. Eliz. 398; *Kingwell v. Chapman*, 2 Leon. 155. It may also be observed that in those cases where a lessee has been held liable for a breach of his covenant to repair, in case of a destruction of the demised premises by inevitable accident, as *Dyer* 33 a, this liability has been held to arise, not on the instant of the destruction, but only on a failure to repair within a reasonable time thereafter.

Another exception to the rule is established where the act to be performed is of a purely personal character, which can only be done by the party himself, or which involves his personal skill or qualification, in which case the act of God, in producing sickness, insanity,

or death, will be an excuse for performance: *Dickey v. Linscott*, 7 Shepley 453; *Knight v. Bean*, 9 Shepley 536; *Fenton v. Clark*, 11 Verm. 360; *Hubbard v. Beldin*, 1 Williams Verm. 645; *Fuller v. Brown*, 11 Metc. 440; *Fahy v. North*, 19 Barb. 342; *Wolfe v. Howe*, 24 Barb. 174; *Jarrell v. Farris*, 6 Missouri 159. In *Dickey v. Linscott*, 7 Shepley 453, it was expressly laid down that a contract for personal manual labour, must be understood to be subject to the implied condition that health and strength remain. An actual inability to perform the labour, arising from sickness at the commencement of the time, although it may not continue during the whole term contracted for, excuses performance.

It is deserving of consideration, particularly in view of this last exception, which certainly is well settled by authority, whether the general rule is not sometimes stated in too broad terms. The decisions on which it is based, the principal classes of which are given above, seem to have been generally those in which the performance of the contract is not rendered impossible in itself, but, by the occurrence of some collateral and unforeseen circumstances, has become unduly burdensome, and its enforcement, at first sight, unjust. Thus where demised premises are destroyed by fire, the payment of the rent or the rebuilding of the premises is not the less possible, because it is a hardship to the lessee. So the payment of demurrage or of the penalty in a charter-party, where the vessel is delayed or the goods are not laden, through unavoidable accident, is not thereby prevented, though the charterer may suffer. And the completion of work, or the delivery of goods within the specified time, is not really precluded, but would only occasion additional and perhaps excessive

expense. In all such cases it may well be that the covenantor ought to be held by the express terms of his covenant, because, as was said in *Paradine v. Jane*, "he might have provided against it in his contract." But where, as in the case of a contract for personal services, the very act to be performed has, by inevitable necessity, become impossible, the consequent excuse for performance may fairly be placed on the ground that its possibility is a tacit element in the contract itself, present to the minds of both parties. If this be so, the argument that the covenantor should have provided against it in express terms, falls to the ground; for his so doing would have been quite unnecessary. *Expressio eorum qui tacite insunt nihil operatur*. Where, therefore, the nature of the contract is such that it can be performed but in one way, or at least only by the party himself, and, by the act of God, such performance is rendered positively impracticable, in its essence, and not as respects a mere collateral matter, it would seem that the maxim *impossibilia nulla est obligatio*, would properly apply. It is an undoubted rule that impossibility at the creation of a contract, avoids it: *Sheppard's Touchst.* 164; *Platt on Covenants* 569: and if the contract did not contain such a tacit exception, as is above supposed, there would be ground to argue that it in itself required what was not possible—a power in the covenantor to control external events. The distinction thus suggested is, at any rate, reasonable in itself, and seems to reconcile most of the authorities. It is also not difficult of application; for, in most cases, good sense and a knowledge of the customs and habits of thought of society, *quæ in contractibus tacite insunt*, will readily indicate the essential elements of a contract.

Whether a promise to marry is

governed by the stricter rule, or falls within the same class as contracts for personal service, is so thoroughly discussed in the case in the text, as probably to leave nothing unsaid on either side. It is sufficient here to mention a few American authorities which bear on the question. In the first place, it is settled that the right of action for a breach of promise is purely personal, and as such dies with the person: *Lattimore v. Rogers*, 13 Serg. & R. 164; *Stebbins v. Palmer*, 1 Pick. 71. Next, it is clear that chastity in the woman is a tacit and essential element in the contract, unless her true character were known at the time of the promise: *Snowman v. Wardwell*, 32 Maine 275; *Berry v. Bakeman*, 44 Maine 164; *Butler v. Eschelman*, 13 Illinois 44; *Boynton v. Kellogg*, 3 Mass. 184; *Palmer v. Andrews*, 7 Wend. 143. Yet it is only immodest and unchaste conduct which will excuse a breach of promise. Breaches of the criminal law, which have no relation to the marriage state, such as profane swearing, or violent language and threats in a woman, have been held to be no justification in such a case, whatever effect they might have on the damages: *Berry v. Bakeman*, 44 Maine 164. On the other hand, partial insanity, fraudulently concealed by the relatives of the woman, has been held to be ground for a divorce *ab initio*: *Keyes v. Keyes*, 2 Foster 553; and would seem *a fortiori* to be a ground for refusing to complete an engagement.

The rule in the older French law, has been stated in the text from Pothier. In the Canon Law, though the *Sponsalia* or promises *per verba de futuro*, are regarded as nearly equivalent to marriage, yet they may be rescinded by one party alone, for certain causes, unknown at the time or arising subsequently, as "la maladie, la mutilation, ou bien si

l'autre partie viole des devoirs essentiels." Walter, Manuel de Droit Eccl., trans. de Roquemont, § 297. Thus supravient leprosy, though not a cause for dissolution of marriage, is an excuse for a breach of promise: C. 3, Extr. de Conj. Lepr. So where the

woman afterwards becomes *publica meretrix*, or *non solum leprosa sed etiam paralytica, vel oculos vel nasum amitteret, vel quicquam ei turpius eveniret*, it will also relieve the other party from his engagement, though confirmed by an oath: C. 25 Extr. de Jurejur.

*796] *The following case may conveniently be inserted here.

ELIZABETH BEACHEY v. HENRY LANGFORD BROWN.

[February 15, 1860.]

Declaration by a woman on an agreement between herself and defendant to marry one another within a time elapsed before the suit; averment that a reasonable time had elapsed before the suit, and plaintiff had always been ready and willing to marry defendant; but defendant had refused.

Plea: that, before and at the time of the agreement, plaintiff and Y. had agreed to marry one another, which agreement was in full force, as plaintiff knew, but of which defendant was then ignorant; and that, though plaintiff ought fully to have disclosed the same to defendant before the making of the agreement, and though defendant would not have made the agreement had the same been disclosed to him before the making thereof, plaintiff, at the time of the agreement, withheld and concealed the same from defendant, and defendant made the agreement whilst he was wholly ignorant of the same.

On demurrer: held a bad plea; there being no express allegation of fraud.

THE declaration alleged that plaintiff and defendant agreed to marry one another within a time which elapsed before this suit; and a reasonable time for such marriage elapsed before this suit; and the plaintiff has always been ready and willing to marry the defendant: yet the defendant has neglected and refused to marry the plaintiff.

Plea (2d). That, before and at the time of the plaintiff's and the defendant's so agreeing as in the declaration mentioned, the plaintiff and one Charles Yeales had agreed to marry one another; which said agreement was then subsisting and in full force; and the plaintiff then was actually engaged to marry the said Charles Yeales, as she then well knew; but of which the defendant was then wholly ignorant: and that, though the plaintiff ought to have fully disclosed the same to the defendant before the making of the agreement in the declaration mentioned, and though the defendant would not have made the said agreement had the same been disclosed to him by the plaintiff before the making
*797] *thereof, yet the plaintiff, at the time of the making of the said agreement, withheld and concealed the same from the defendant, and procured the defendant to, and the defendant did make the said agreement on his part whilst he was wholly ignorant of the same.

Demurrer. Joinder.

T. Jones (Northern Circuit), for the plaintiff.—No instance of such a plea can be found. Fraud is not alleged; and, in the absence of fraud, misrepresentation does not avoid a contract, with the single exception of contracts of marine insurance, which are *uberrimæ fidei*; the rule, that the insurer warrants the truth of what he asserts, does not even extend to policies of life assurance: *Wheelton v. Hardisty*, 8 E. & B.

232 (E. C. L. R. vol. 92). [COCKBURN, C. J.—May this be called a special plea of fraud? HILL, J.—It is not averred that the plaintiff knew that the defendant did not know of the first contract: the fraud, if to be insisted on, should be expressly shown. CROMPTON, J.—Concealment may be active or passive. A man may attempt to conceal a flaw in a ship's side by fastening something over it; or he may say nothing about it. Here is nothing active.] The Court cannot infer fraud from the nature of the contract and the facts. [COCKBURN, C. J.—In Roman Catholic countries a precontract of marriage would make a subsequent marriage with another void: but, even then, I suppose a defendant, who set up his own precontract, must pay damages. CROMPTON, J.—I do not see why the defendant, if this defence be good, might not insist on any supposed defect which he might discover.] It would not even be a good defence that he *had discovered the plaintiff to be of bad reputation: *Baddeley v. Mortlock*, Holt's N. P. C. [*798 151 (E. C. L. R. vol. 3): it is the business of the defendant to inquire before he makes the contract. If, indeed, in this case the plaintiff had taken active steps to mislead the defendant, fraud might perhaps be pleaded: (a) but the plaintiff is entitled to have the allegation of fraud placed on the record in order that she may traverse it. How does it appear but that the defendant might treat the breach of the existing contract as a mark of regard to himself? [CROMPTON, J.—He does say that he would not have made the agreement if he had known of the first contract. HILL, J.—The dictum in *Irving v. Greenwood*, 1 C. & P. 350 (E. C. L. R. vol. 12), by Abbott, C. J., is strong to show that, before the New Rules, it might be shown, as an answer to a declaration for breach of promise of marriage, that defendant, after making the contract, discovered the plaintiff to be of loose character; and there is a dictum in *Baddeley v. Mortlock* to the same effect by Gibbs, C. J. The marginal note in *Young v. Murphy*, 3 New Ca. 54 (E. C. L. R. vol. 32), is not justified by the case: there was no decision; and the plaintiff amended.] It should seem that, since the New Rules, defences like those spoken of in *Baddeley v. Mortlock* and *Irving v. Greenwood* should be raised by a plea showing direct fraud. Possibly such a plea might be supported by proof that the plaintiff had placed herself in a position to which she was not entitled. But this plea alleges no concealment which might not have been entirely accidental, or have occurred in the confusion natural upon the contracting of such an engagement. It was the business of the defendant to *learn how the fact was. [*799 [CROMPTON, J.—Do you say that he ought to have asked the question?] He was bound to decide for himself whether he knew enough of the circumstances to make it advisable for him to enter into the contract.

Beresford, contra.—In Addison On the Law of Contracts 679 (ed. 4), the rule of Pothier is cited. "If a man comes to discover the existence of circumstances connected with the person he has engaged to marry, which would have prevented him, had he known them at the time of his betrothment, from entering into the contract, he is discharged from his engagement." (b) Mr. Addison adds: "But a man cannot make himself a judge in his own case, and the discharge from

(a) See *Wharton v. Lewis*, 1 C. & P. 529 (E. C. L. R. vol. 12).

(b) Pothier, *Traité du Contrat de Mariage*, Part II. chap. I. Art. VII. s. 62.

liability depends rather upon the nature of the circumstances, the light in which they would be regarded by mankind at large, and the existence or non-existence of fraud. If one party has been convicted of a crime, and the other did not know of it at the time of the betrothment, the contract may be rescinded by the party who was kept in ignorance of the fact." [COCKBURN, C. J.—Suppose a woman had concealed the fact that she was in debt: would it not be said that it was the man's business to inquire how the fact was? HILL, J.—The plea says that "the plaintiff ought to have fully disclosed:" is that an allegation of a duty resulting from the mere legal relation of the parties, or an allegation of fraud?] It would be a question for a jury. [CROMPTON, J.—Ought she to disclose that she wears false hair?] Suppose a widow enters into the contract, and conceals that she has been married. *800] [CROMPTON, J.—If she positively declared that she had *not, it might perhaps raise a defence. COCKBURN, C. J.—You seem to assume that there is an implied warranty of the virginity, not only of the person, but of the affections.] That is not an unreasonable implication. The plea alleges that the defendant, had he known of the first contract, would not have made the agreement. [COCKBURN, C. J.—He might say so, if he discovered that she was in debt.] The defendant, by his contract, was to be entitled to the personal property of the plaintiff: but he is called on to take upon himself the liability to a lawsuit. [COCKBURN, C. J.—Suppose he discovered that the plaintiff had published a libel, or assaulted somebody. CROMPTON, J.—I must say that I can see no distinction between a liability to debt and a liability to damages.] In *Harrison v. Cage*, 1 *Ld. Raym.* 386, Lord Holt says that, though a precontract of marriage creates a disability, "it will not avoid the performance of your promise, because it proceeds from your own act." He there speaks of a precontract by the party who is called upon to perform the promise: it seems to follow that he would have held such a precontract by the party claiming the performance of the promise to be an avoidance of the promise, as not being the act of the party who is called upon to perform. [CROMPTON, J.—In 1 *Blackst. Com.* 435, it is pointed out that stat. 32 H. 8, c. 38, declares impediments to marriage arising from precontracts to other persons to be abolished and of none effect, unless consummated with bodily knowledge, in which case there would, by the canon law, be a marriage *de facto*; but that this branch of the statute was repealed by stat. 2 & 3 Ed. 6, c. 23. Blackstone there states a question, which he leaves undetermined, "how far the Act of *26 Geo. ii. c. 33 (which prohibits all *801] suits in ecclesiastical courts to compel a marriage, in consequence of any contract), may collaterally extend to revive this clause of Henry viii.'s statute, and abolish the impediment of precontract." But stat. 26 G. 2, c. 33 (s. 13), seems only to prevent the Ecclesiastical Courts from enforcing the precontract. I should like to know how they would proceed now in the Ecclesiastical Court.] No reason can be suggested for holding a contract of marriage to be less *uberrimæ fidei* than a contract of marine insurance. As Erle, J., pointed out in *Hall v. Wright*, *antè*, p. 755, the indiscriminate carrying out of contracts of marriage would produce intense misery. [HILL, J.—The defendant may then pay damages. A man would probably be very miserable at having

to pay a bond for ten thousand pounds.] The materiality of the fact concealed is for a jury.

T. Jones, in reply.—Stat. 4 G. 4, c. 76, s. 27, re-enacts the provision of stat. 26 G. 2, c. 33, s. 13, prohibiting the Ecclesiastical Courts from enforcing a marriage contract: Rogers's Ecclesiastical Law, p. 645 (2d ed.), referring to *Holt v. Clarendieux*, 2 Str. 937. On reference to Swabey On the Act to amend the Law relating to Divorce, &c., p. 49 (3d ed.), it will be found that a precontract is not among the causes of nullity of marriage stated in the Report of the Divorce Commission. [HILL, J., referred to *Regina v. Millis*, 10 Cl. & F. 534.] If there were a precontract by the plaintiff amounting to an actual marriage, of course the plaintiff could not aver that she was always ready and willing to marry the defendant: but nothing like *that is set up. The plaintiff is liable to defendant on her contract to marry him; that [*802 is the consideration for defendant's promise: *Wild v. Harris*, 7 Com. B. 999 (E. C. L. R. vol. 62). (He was then stopped by the Court.)

COCKBURN, C. J.—I am of opinion that there ought to be judgment for the plaintiff, the plea disclosing no defence. If the old law existed, under which a precontract of marriage exposed a party to proceedings in the Ecclesiastical Court for the purpose of enforcing the precontract, or annulling a future contract of marriage with another, there might be good reason for not allowing an action claiming damages for the non-performance of the second contract: but that state of things is abrogated since the power of the Ecclesiastical Court in this respect is taken away by stat. 26 G. 2, c. 33, s. 13, and stat. 4 G. 4, c. 76, s. 27. Then is there any other reason why the plaintiff should not ask for damages for breach of this contract? It is said that the contract of marriage is one *uberimæ fidei*. I agree that there are many things which a man might desire to have communicated to him, if they existed, at the time of making the contract, such as that the plaintiff is in debt, or subject to other liabilities, or some circumstances relating to her person, her temper, her disposition, the discovery of which would yet not entitle the defendant to refuse to fulfil his engagement. It might be right to disclose such things; and yet it has never been held that the discovery of them justified a party in breaking his contract. Where it turns out that a woman is of unchaste conduct, which goes to the very root of the contract of marriage, there, *from the excess and necessity of the case, the man is released from his contract. But nothing of the [*803 sort is disclosed here: there is no imputation on the virtue or honour of the plaintiff; and the case does not fall within the principle which makes the misconduct of the woman an answer to the action. No bar, therefore, to the action is shown upon the record.

CROMPTON, J.—I am entirely of the same opinion. Mr. Beresford rests his argument upon the non-disclosure of a material fact. But I do not think the non-disclosure of a fact, which is material in the mind of the defendant, is enough. The case is not put upon the ground of fraud; and I agree with my brother Hill that fraud must be stated distinctly. There can be no fraud except in a matter which forms part of the contract; and here that is not shown: and fraud is not alleged. The real distinction as to circumstances showing or not showing fraud is between active and passive concealment. There is a class of cases showing that moral turpitude, or an incompetency for the purposes of

marriage on the part of the plaintiff, furnishes a defence on the action on the contract. But here neither turpitude nor incompetency is shown. There are many cases falling within the statement in the plea, in which a party might not be to blame for the concealment: a woman might be engaged to marry a person who was a very undesirable husband, and to whom her parents objected; and this might have taken place many years ago, although there had been no actual release. The allegation therefore in the plea, which seems to be of a consequence in law, that the plaintiff ought to have disclosed the fact, is not supported. Nor is *804] it shown that the plaintiff is in a position in which it would *be improper for her to marry. Such a defence as this seems to me very dangerous. I do not know where we could stop. We might come to cases like those in the French law, mentioned in *Hall v. Wright*, ante, p. 760, where a party refuses to perform his contract because he had less fortune now than when he made the contract; or he might complain of defects in the plaintiff's person; he might say, had I known of such and such circumstances I should not have liked to make the engagement. The plea really comes to no more. He might complain that what he took to be a beautiful head of hair turned out to be a wig. I think Mr. *Beresford* is right in not insisting on the plea being an allegation of inability to marry: indeed it does not show any incapacity to contract marriage. The precontract shown is not of that kind which is an impediment to a marriage with another party. When the law speaks of a contract by words de præsenti, or by words de futuro followed by cohabitation, it means a contract of actual marriage, though irregular, not an engagement to enter into such a contract. But even a precontract of the former sort does not now prevent a marriage with another party; for it could be insisted on only as showing the nullity of a later contract upon which a party was insisting in an ecclesiastical suit. It would not prevent a marriage with another party. What is shown here is not a precontract of that sort. And, if it were, I, as at present advised, think that the state of things under which it would have constituted an impediment to a subsequent contract has been put an end to by the statutes. The plaintiff has made, not a previous contract of marriage, but a promise to make such a contract.

*805] *HILL, J.*—I am of the same opinion. The plea does not allege fraud, and cannot therefore be construed as setting up fraud. And, in my judgment, it does not set up a precontract disabling the plaintiff from performing the contract for a breach of which she sues. Without going into the question of what the state of the law was between the time of Edward 6th and George 2d, or whether such a precontract constituted an actual matrimonium or only a contract to marry which the contractor might be called on to perform in facie ecclesiæ, I think that, at any rate since stat. 26 G. 2, c. 33, and stat. 4 G. 4, c. 76, such an impediment could no longer be pleaded. Before stat. 26 G. 2, c. 33, such a precontract as could be enforced in a Court Christian might have constituted an objection, as showing an incapacity to perform the second contract. The plea, however, sets up no such defence. The ground on which Mr. *Beresford* insists fails. I know of no legal obligation to communicate the fact of the former contract. The defendant might be the very person who induced the plaintiff to break that contract, by winning her from her first love: it would be hard that he should be allowed to set

that up as a reason for not performing his contract or paying damages for the breach of it. Such circumstances may have a very material effect with the jury as to the amount of damages. But, for the reasons I have mentioned, I think that the plea is bad in law, and that the plaintiff is entitled to our judgment.

(No other Judge was present.)

Judgment for the plaintiff.

***ANDERSON v. RADCLIFFE and WALKER. June 11. [*806**

W. having recovered a verdict in ejectment, executed an indenture, on the day following, reciting that he was indebted to the attorney who had conducted the suit in 100*l.* for money lent and for work as an attorney, and was unable then to pay it, and had agreed to secure, as after mentioned; and he granted and assigned to the attorney the crop of potatoes then growing upon the close which was the subject of the action, and all other effects then thereon, with power to the attorney to enter upon the close, and inspect, until payment of the 100*l.* and interest; proviso that, if W. should pay the 100*l.* and interest by a day named, the indenture should be void; covenant by W. to pay the 100*l.*, and the interest, meanwhile; power to the attorney, in case of default of payment, to enter and carry away the effects assigned, or otherwise to remain on the premises for the purpose of disposing of the effects, and converting them into money; proviso, that, till default, W. should remain in possession, and that, if the attorney sold the property, he should hold the surplus, after paying the expenses and reimbursing himself, in trust for W.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that this indenture could not be impeached, either on the ground of its amounting to champerty or maintenance, or as being contrary to public policy.

Default was made in the payment: and, on the day following the day named for the payment, judgment was signed in the ejectment. Afterwards judgment was recovered against W. in an action by B., in a *fi. fa.* issued: after that, a *habere facias* issued in the ejectment; after that the sheriff seized the property under the *fi. fa.* in the action of B. against W.; after that, possession under the *habere facias* was delivered to W., and by W. to the attorney; and the attorney gave notice of his title to the sheriff; afterwards the sheriff under the *fi. fa.* sold the crop of potatoes, and W.'s interest in the close. The attorney brought an action against the sheriff; after the commencement of which the sheriff's vendee gathered the potatoes, and disposed of them to his own use.

Held, by the Court of Queen's Bench, that the action lay; the sheriff having, after possession had been given to the attorney, authorized the conversion of the potatoes.

Judgment affirmed in the Exchequer Chamber, on the ground that, at any rate, the attorney's possession related back to the accruing of his title, which was prior to the first seizure by the sheriff.

THE declaration stated that the defendants broke and entered the close of the plaintiff, and dug up and seized divers crops of potatoes of the plaintiff, then growing and being in and upon the said close, and carried away the same and converted and disposed thereof to their own use, and wrongfully deprived the plaintiff thereof, and of the use and possession thereof; and also for that the defendants detained from the plaintiff divers crops of potatoes of the plaintiff, and divers potatoes and chattels of the plaintiff.

*Pleas. 1. Not guilty. 2. That the close, crops, potatoes, and chattels were not the plaintiff's as alleged. Issue upon both [*807 pleas.

At the trial, before Martin, B., at the last Spring Assizes for York, it appeared that, on or about the 18th May, 1857, an action of ejectment was brought by Stephen Walton against Robert Stather and Robert Johnson, for the recovery of the close of land mentioned in the declaration. The estate and interest which Walton had in the said close, and

which he sought to recover, and did ultimately recover, in the action of ejectment, was under a lease granted to him by Mr. and Mrs. Chapman for fourteen years from 6th April, 1845. He never had any other estate or interest therein. The plaintiff, at the time of the commencement of the action of ejectment, and until the signing of the judgment herein-after mentioned, was an attorney and solicitor, and the attorney for Walton in the action of ejectment; and, from its commencement until the signing of the said judgment, acted as Walton's attorney. On 10th July, 1857, the said action of ejectment came on to be tried, when a verdict was found for Walton. At that time, and thence until and at and after the execution of the bill of sale under the writ of *fi. fa.* as hereafter mentioned, a crop of potatoes was growing on the said close. On 11th July, 1857, Walton executed an indenture between himself of the first part and the plaintiff of the second part, by which, after reciting that Walton was indebted to the plaintiff in 100*l.* for money lent and for work as an attorney, and that Walton was unable to pay it at that time, and had agreed to secure payment thereof as thereafter mentioned, Walton granted and assigned to the plaintiff, his executors, administrators, *and assigns, the crop of potatoes then growing upon the

*808] said close, and "all the rest, residue, and remainder of the estate and interest of" Walton in the said close, and all other goods, chattels, effects, and things then thereon; "with full power and authority for" the plaintiff, his executors, &c., "or any of their servants, agents, and others, from time to time to enter into and upon the said close" and inspect, until payment of the said sum of 100*l.* and interest; with a proviso that, if Walton should pay the said 100*l.* and interest by the 16th July then next, the indenture should cease and determine and be utterly void; otherwise to remain in full force. The deed also contained a covenant by Walton to pay the 100*l.* and the interest meanwhile; and a power to the plaintiff, his executors, &c., in case default should be made by Walton in payment of the said 100*l.*, to enter and "take, seize, and carry away the said property and effects" thereby assigned, "or otherwise to remain upon the" premises "for the purpose of selling, getting in and disposing of, or otherwise converting into money," the said property and effects, and to sell the same. There was also a proviso that, until such default, Walton, his executors, &c., should remain in possession: and it was further provided that, in case the plaintiff sold the property, he should hold the surplus proceeds, after paying the expenses of the sale and reimbursing himself, in trust to pay them over to Walton, his executors, &c. This deed was registered as a bill of sale.

The said 100*l.* was a *bonâ fide* debt; and Walton made default in paying it according to the terms of the indenture.

On 17th July, 1857, judgment was signed and entered in the said action of ejectment for Walton.

*809] On 18th July, 1857, Joseph Blanchard Burland obtained a judgment against Walton for 62*l.* 1*s.* in the Court of Queen's Bench. On 20th July, 1857, Burland caused a writ of *fi. fa.* to be issued on the said last-mentioned judgment, directed to the sheriff of Yorkshire; and on the same day caused the writ to be duly delivered for execution to the defendant Radcliffe, who then, and until and at the time of the execution of the bill of sale hereafter mentioned, was sheriff of Yorkshire. On the same 20th July, 1857, a warrant was duly

granted by the said sheriff upon the said writ of fi. fa., and delivered by him for execution to the defendant James Walker, who then, and until and at the time of the execution of the bill of sale as hereinafter mentioned, was one of the bailiffs of the said sheriff, and duly authorized to execute the said warrant.

On 21st July, 1857, a writ of habere facias possessionem upon the said judgment in ejectment was duly issued and delivered for execution by the plaintiff, as attorney for Walton, to the said sheriff, who, on the same day, granted his warrant thereon, and delivered the same for execution to George Acton, another of the bailiffs of the said sheriff.

On 23d July, 1857, the defendant Walker, assuming to act under the said warrant on the said writ of fi. fa., entered upon the said close and seized the crop of potatoes then growing thereon, and put padlocks upon the gate of the said close. On the same day, but a few moments after the said entry and seizure by the defendant Walker, and after the said James Walker had put padlocks on the said close, the said George Acton, assuming to act under the said warrant on the said writ of habere facias possessionem, entered into and delivered *possession of the said close and of the said crop of potatoes then growing thereon to [810 Walton, who afterwards, on the same day, delivered possession thereof to the plaintiff, under the said assignment of 11th July, 1857. Afterwards, on the same day, the defendant Walker caused Walton's interest in the premises, and also the crop of potatoes, to be advertised for sale by public auction, under the writ of fi. fa.

On 25th July, 1857, the plaintiff caused the defendants and Burland to be served with notice of his title under the indenture.

On 30th July, 1857, the defendant Walker, assuming to act under the said warrant on the said writ of fi. fa., put up for sale, pursuant to the said advertisement, the said crop of potatoes and Walton's interest in the close. Walker acted as auctioneer at the auction. The sale was in one lot, which was knocked down to and sold by Walker to Robert Johnson for 30*l.*, which was paid by Johnson to Walker. On 31st July, 1857, an assignment of the term alone was made by the defendant Radcliffe to Johnson, who afterwards, but after the commencement of this suit, gathered the said potatoes and disposed thereof to his own use.

A verdict was entered for the plaintiff for 50*l.*, with leave to the defendants to move on certain points reserved at the trial, and stated in the rule *Nisi* hereinafter mentioned; the plaintiff being at liberty to make such amendments as the Court might think fit.

Atherton, in last Easter Term, obtained a rule calling on the plaintiff to show cause why the verdict entered for the plaintiff should not be set aside, and a verdict entered for the defendants, on the grounds: "first, that the plaintiff could not maintain trespass against the *defendants, the plaintiff not having been in possession before [811 the defendants seized; secondly, that the defendants were not shown to be trespassers, they having seized and assigned the chattels real only; thirdly, that the bill of sale from Walton to the plaintiff was void, being a bill of sale to the plaintiff of the subject-matter of a suit in which he was attorney for the plaintiff therein, *pendente lite*."

S. Temple and *T. Jones* (Northern Circuit) now showed cause.—As to the first objection, that the plaintiff was not in possession at the time of the trespass: no doubt the actual possession, at the time when the

writ of *fi. fa.* was executed, was in Stather and Johnson, because the writ of *habere facias possessionem* to Walton had not then been executed. But, after it had been executed, the plaintiff's right to possession, which would then accrue, in virtue of the assignment to him by Walton and Walton's default in payment, would relate back to the antecedent trespass, and give him a right of action. *Litchfield v. Ready*, 5 Exch. 939,† may be relied on by the defendants as an authority to the contrary: but that case is, at least, qualified by *Barnett v. Earl of Guildford*, 11 Exch. 19.† [Lord CAMPBELL, C. J.—To what date do you contend that the plaintiff's title related back?] To the date of the verdict in ejectment against Stather and Johnson. From that moment they were wrongdoers in keeping out Walton; and both his title, and the plaintiff's subsequent right of entry, relate back to that time. [CROMPTON, J.—I doubt if the doctrine of relation applies to a right of *812] entry acquired, as this was, by assignment *under a bill of sale.] The title was certainly in the plaintiff after the 16th July: the *fi. fa.* was not issued till afterwards, and therefore, by stat. 19 & 20 Vict. c. 97, s. 1, does not prejudice the title. At all events, the plaintiff may amend his declaration, under the leave given at the trial, by averring that the reversion was in him at the time of the trespass, and alleging injury to such reversion.

As to the second objection, that all that the defendants did was to assign the term: it was proved that the defendants authorized the digging up and removal of the potatoes as separate chattels, after notice of the plaintiff's title, and after he had been put into possession.

As to the third objection, that the bill of sale by Walton to the plaintiff is void for champerty: first, that objection can be taken only by the client: secondly, the transaction does not amount to champerty. *Simpson v. Lamb*, 7 E. & B. 84 (E. C. L. R. vol. 90), will be relied upon for the defendants. But there the subject-matter of the suit was purchased, out and out, by the attorney, *pendente lite*: here it is assigned to him, *pendente lite*, only as a security; and such a transaction is not within the mischief against which the statutes relating to champerty were intended to provide, namely, the attorney taking an undue advantage of his client in the purchase, from his greater means of knowledge as to the value of the subject-matter. [Lord CAMPBELL, C. J.—The old word for champerty is "*campi partitio*."] The statutes clearly point to a purchase out and out: 3 stat. 28 Ed. 1, c. 11, enacts that "the King will, that no officer nor any other (for to have part of *813] the thing in plea) shall not take *upon him the business that is in suit; nor none upon any such covenant shall give up his right to another; and if any do, and he be attainted thereof, the taker shall forfeit unto the King so much of his lands and goods as doth amount to the value of the part that he had purchased for such maintenance." But the statute afterwards enacts that "it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of learned men in the law for his fee, or of his parents and next friends." This clause applies directly to the present case. [CROMPTON, J.—Lord Coke's comment on it is directly against you.] He says (2 Inst. c. 11, p. 564), "if the serjeant at law, apprentice, or attorney do take a feoffment hanging the plea, or the like to maintaine the tenant, though it be *pro suo dando*, in lieu of his fee, yet is this champerty within the pur-

view of this statute; for their counsell, that is, their advice and direction in their profession of law is excepted: but to take any estate in the land, hanging the writ, for maintenance, is to become a party, and in no sort allowed to them by this Act." But Lord Coke is there speaking of a sale to the attorney, out and out, of the whole or part of the subject-matter of the suit, not of an assignment to him by way of security only. [CROMPTON, J.—A mortgage is a sale pro tanto.] It has frequently been decided that an assignment like this is not void for maintenance or champerty. In *Harrington v. Long*, 2 Myl. & K. 590, and *Hartley v. Russell*, 2 Sim. & S. 244, a Court of equity held that the mere transfer, to a stranger, of an interest which is the subject-matter of a suit, unaccompanied by any stipulation that the proceedings should be carried on by the transferee, *is not maintenance or [*814 champerty. And, even where such transfer is to the attorney, it is void within the statute only where it is a transfer out and out, and not made merely by way of security. That appears from the decisions, in equity, in *Wood v. Downes*, 18 Ves. 120, and *Hall v. Hallet*, 1 Cox Ca. Eq. 134. In those cases it was decreed that an assignment to an attorney of the subject-matter of the suit was void as an absolute assignment, as amounting to champerty, but was to stand good as a security for any moneys advanced by the attorney. Here, moreover, the estate has become actually vested in the plaintiff; and, even if the transaction as between Walton and himself was fraudulent or contrary to public policy, still, in accordance with the doctrine laid down by the Court in *Feret v. Hill*, 15 Com. B. 207 (E. C. L. R. vol. 80), he would not be the less the owner for the purposes of this action.

Atherton and Kemplay, contra.—First, the assignment by Walton to the plaintiff is void. It amounts to champerty within 3 stat. 28 Ed. 1, c. 11, which provides against maintenance or champerty generally, and by others than officers or clerks of the King, specified in the previous statutes, 3 Ed. 1, c. 25, 3 Ed. 1, c. 28, and 1 stat. 13 Ed. 1, c. 49. Lord Coke's comment upon 3 stat. 28 Ed. 1, c. 11, clearly shows that an assignment like this is illegal. It has been argued that the statutes apply only to sales, out and out, of the subject-matter of the suit. But, in law, the instrument here operates as a sale; the assignor has only an equity of redemption. [Lord CAMPBELL, C. J.—It is a sale by way of security only.] It is not the less a sale within the statutes [*815 *relating to champerty: the difference between it and an absolute sale is one only of degree. *Wood v. Downes*, 18 Ves. 120, is the only authority at all in favour of the plaintiff. But in that case the bill itself prayed that the contracts executed by the testator with the defendants might be declared fraudulent and void as an absolute sale, but might stand good as a security for what might be due on the general account. [Lord CAMPBELL, C. J.—That shows, at all events, that it was understood that such a prayer would be allowed in equity.] It does not show that the contract might not have been declared null altogether: a Court of equity may allow, at the request of the party who has a right to treat the contract as null, that it shall stand in a qualified shape. In *Simpson v. Lamb*, 7 E. & B. 84 (E. C. L. R. vol. 90), *Wood v. Downes* is mentioned by the Court, in giving judgment, as a decision that no attorney can be permitted to purchase anything in litigation, of which litigation he has the management. *Hall v. Hallet*, 1 Cox Ca. Eq.

134, lays the rule down quite as broadly. *Feret v. Hill*, 15 Com. B. 207 (E. C. L. R. vol. 80), was cited to show that the title given by the assignment cannot now be impeached. But in that case the contract, legal in itself, was obtained by means of a collateral fraud, and therefore was simply voidable: here it is illegal, and therefore void ab initio.

Secondly, the plaintiff has, at all events, no action against the defendants. The assignee of the term, Johnson, was the person who dug up and removed the potatoes: all that the sheriff did was to assign the term to him, under the *fi. fa.*, as he was authorized to do: *Watson on Sheriffs*, *816] p. 252 (2d ed.); *Taylor v. Cole*, 3 T. R. 292. *The declaration cannot be amended so as to show a cause of action by the plaintiff against the defendants. Walton, who, under the bill of sale, was in effect mortgagor in possession, did not give up possession to the plaintiff till after the alleged trespass by the sheriff, which took place before the execution of the writ of *habere facias possessionem*. That writ would replace Walton from the time of his disseisin; and therefore his title would relate back to the alleged trespass by the sheriff: but the plaintiff's title would not; he was not in possession. [Lord CAMPBELL, C. J.—He had the legal estate, though not the corporeal possession.] It has been contended that the defendants were guilty of an act of trespass after the plaintiff had possession.

Lord CAMPBELL, C. J.—If all that took place upon the execution of the writ had been an assignment of the term, *tale quale*, by the sheriff, I think the defendants would not have been liable. But it appears clear that, while the sheriff was, by his officer, upon the premises, the potatoes were sold by the latter, as separate chattels, apart from the term. The only question therefore is, Whether the deed of assignment by Walton to the plaintiff is valid, so as to make the plaintiff the party entitled to sue. I think that it is. In *Simpson v. Lamb*, 7 E. & B. 84 (E. C. L. R. vol. 90), which was relied upon for the defendants, it was decided that, if an attorney, *pendente lite*, purchases the subject-matter of the action, he is guilty of champerty or maintenance. But nothing was said in that case as to the assignment of such subject-matter by way of security: and the distinction between that and a sale, out *817] *and out, seems to be well established. The statutes relating to champerty and maintenance are rather obscure; and we must therefore look to the construction which has been put upon them. The result appears to be (and Lord Coke's commentary is strongly in favour of such a view) that the assignment to the attorney of the subject-matter of the suit by way of security is not unlawful. There is a clear distinction between such a conveyance and an absolute sale of the subject-matter of the suit. In the latter case the attorney might have an opportunity of imposing on his client, from his superior knowledge of the value of that subject-matter, and might, after the purchase, take improper means to increase the value. But, on the other hand, a mere assignment, by way of security, is open to no such danger, and may be very advantageous to the client. *Wood v. Downes*, 18 Ves. 120, is a clear authority, in equity, as to the distinction between the two transactions. There the sale by a client to his attorney, *pendente lite*, of the subject-matter of the suit, though liable to the charge of champerty, was decreed to stand good as a security only for what was actually due. It is true that the prayer of the bill sought no more than what was decreed.

But the case clearly shows what was the established doctrine in equity upon this point; and Lord Eldon expresses no doubt in giving judgment. Here the deed itself professes to be nothing more than a security: the attorney is a trustee for Walton in respect of any surplus arising on the sale. I am therefore of opinion, for the reasons and on the authorities *which I have mentioned, that the security is valid, and that [818 therefore the plaintiff can maintain this action.

(COLERIDGE, J., was absent.)

ERLE, J.—I also am of opinion that the deed is not void for champerty. The statutes relating to that offence were directed against speculations by attorneys in suits. But this transaction is not within the mischief provided against: and the law would be oppressive if the client might not raise money by charging that which he claims to be entitled to. The distinction taken in *Wood v. Downes*, 18 Ves. 120, seems to me to be a sound one. It is recognised in *Simpson v. Lamb*, 7 E. & B. 84 (E. C. L. R. vol. 90), and, I think, more than once by the Courts of equity. I felt some difficulty at first as to whether the action lay against the sheriff for what was done with respect to the growing crops. But it appears that, under the *fi. fa.*, he authorized the digging up and sale of the potatoes, as chattels, separate from the term; and that is a trespass for which an action lies.

CROMPTON, J.—It is clear, from *Wood v. Downes*, that a deed like this, assigning to the attorney the subject-matter of the suit by way of security only, is valid. It is neither fraudulent nor illegal; and therefore the distinction which it was attempted to raise between fraudulent and illegal contracts cannot apply. There is some doubt as to whether the plaintiff's title would relate back to the first trespass by the sheriff. *The intervention of Walton's title makes the question somewhat [819 difficult; and I do not give an opinion either way. But it is clear that, after the plaintiff's title had accrued, and after he was in possession, the sheriff authorized the digging up and sale of the potatoes, as chattels, apart from the term: and for that trespass he is liable.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

RADCLIFFE and WALKER v. ANDERSON. [Feb. 8, 1860.]

[For syllabus, see *antè*, p. 806.]

THE defendants having appealed in the Court of Exchequer Chamber against the above decision, the case was now argued.

Kemplay, for the appellants (defendants below).—First, the mortgage of 11th July, 1857, was void, as being a sale of matter in suit, made *pendente lite*. The first statute on the subject was *Westminster the First*, 3 Ed. 1, c. 25: that applied only to officers of the King; 2 Inst. 207; and c. 28 of the same statute applies to the "clerk of any justice, or sheriff;" 2 Inst. 212. Then the *Statute of Westminster the Second*, 1 stat. 13 Ed. 1, c. 49, enacts that "the chancellor, treasurer, justices, nor any of the King's council, no clerk of the Chancery, nor of the Exchequer, nor of any justice or other officer, nor any of the King's

House, clerk ne lay, shall not receive any church, nor advowson of a church, land, nor tenement *in fee, by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers:" 2 Inst. 484. In the *Articuli super chartas*, 3 stat. 28 Ed. 1, c. 11, the enactment is made general: "And further, because the King hath heretofore ordained by statute, that none of his ministers shall take no plea for maintenance, by which statute other officers were not bounden before this time; (2) The King will, that no officer nor any other (for to have part of the thing in plea) shall not take upon him the business that is in suit; (3) nor none upon any such covenant shall give up his right to another; (4) and if any do, and he be attainted thereof, the taker shall forfeit unto the King so much of his land and goods as doth amount to the value of the part that he hath purchased for such maintenance. (5) And for this atteindre, whosoever will, shall be received to sue for the King before the justices before whom the plea hangeth, and the judgment shall be given by them. (6) But it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of learned men in the law for his fee, or of his parents and next friends." 2 Inst. 563. The essence of the offence, as appears by Lord Coke's comments, consists in making a conveyance of property which is the subject of litigation, pendente lite. And that is the principle of *Simpson v. Lamb*, 7 E. & B. 84 (E. C. L. R. vol. 90), which Lord Campbell recognised in his judgment in the present case in the Court below. There, as here, the purchase was by the vendor's attorney. In *Wood v. Downes*, 18 Ves. 120, as was pointed out below, the general question was not argued. In *Chitty On the Law of Contracts*, p. 592 (6th ed.), champerty is defined as "a bargain with a *plaintiff or defendant, to divide the land or other matter sued for between them, if they prevail at law; wherenpon the champertee is to carry on the party's suit at his own expense."

Next, the plaintiff cannot maintain this action. He had no possession at the time of the seizure by the sheriff; Walton himself had no such possession. It may be, however, that the title of Walton, the actual plaintiff in the ejectment, related back to the verdict or judgment in ejectment, or earlier; but the present plaintiff's title can have no such relation. [WILLES, J.—The title of the purchaser of a chattel interest has relation back.] Suppose Walton, by the *habere facias*, to be in possession as from the time when his title accrued; after the mortgage, he was mortgagor in possession, and was the proper party to maintain trespass. Nothing done after the delivery of possession to Walton was illegal. The sale and the assignment of the term, if the plaintiff was legally in possession, were merely void: *Owen v. Legh*, 3 B. & Ald. 470 (E. C. L. R. vol. 5). The position of a party who, being lawfully entitled to a messuage, enters into it without legal process and holds possession, is discussed in the note to *Taylor v. Cole*, 3 T. R. 292, by the late editors of *Smith's Leading Cases*. (a) No damage having been here done, the action fails: *Tancred v. Allgood*, 4 H. & N. 438; † *Mayhew v. Herrick*, 7 Com. B. 229 (E. C. L. R. vol. 62).

S. Temple, for the respondent (plaintiff below).—After entry, the title of the plaintiff related back to the time when the title accrued: *Barnett*

(a) 1 *Smith's L. Ca.* 110 (4th ed.).

v. Earl of Guildford, 11 Exch. 19.† * [The Court desired him to confine his argument to the question of champerty.] The [*822 objection cannot be taken by a third party: *Knight v. Bowyer*, 2 De G. & J. 421. If the sheriff could intervene, so might any stranger. [WILLIAMS, J.—The Lord Justice Turner, in *Knight v. Bowyer*, distinguishes that case from *Simpson v. Lamb*, 7 E. & B. 84 (E. C. L. R. vol. 90), on the ground that in the last-named case “the purchase was by the attorney from the client of the subject-matter of the suit in which he was attorney.”] It may perhaps be said that in *Simpson v. Lamb* the objection was taken by a third party: but, substantially, the question was between the vendor and the vendee. In 2 Bac. Abr. 26 (7th ed.), *Champerty*, champerty is defined as “the unlawful maintenance of a suit, in consideration of a bargain to have part of the thing in dispute, or some profit out of it.” That definition is inapplicable to this transaction. [BYLES, J., referred to 2 Rol. Abr. 114, *Maintenance* (C.).] It is essential to champerty that there should be some agreement for carrying on the suit, as, for instance, an indemnity for future costs; *Harrington v. Long*, 2 M. & K. 590, *Hartley v. Russell*, 2 Sim. & S. 244; it must be something more than a mere security for costs already due. The public policy comes into consideration only where there is a risk of the attorney imposing on his client, or of litigation being encouraged. But how can that be the case where there is no purchase at all, but only an assignment of a claim, already established, as a security for money already due? The word “purchased,” in 3 stat. 28 Ed. 1, c. 11, manifestly is not used in the technical sense of acquiring otherwise than *by inheritance, but means “buying,” in the popular sense. The same remark applies to the word “purchase” in 1 stat. 13 [*823 Ed. 1, c. 49, where it occurs together with “gift.” [BRAMWELL, B.—The decision in *Simpson v. Lamb*, 7 E. & B. 84 (E. C. L. R. vol. 90), does appear to have turned, not so much on the statutes of champerty, as on the general policy of disallowing a purchase made by an attorney from his client.] That is so. In *Stanley v. Jones*, 7 Bing. 369 (E. C. L. R. vol. 20), the contract was held to be illegal because it provided for the obtaining evidence in the course of the suit.

The Court then called on

Kemplay, in reply.—The suggestion that *Simpson v. Lamb* was a decision merely on general grounds of policy cannot be maintained: had that been so, Shaen, the purchaser in that case, would, according to the doctrine of *Wood v. Downes*, 18 Ves. 120, have been entitled to retain the security for the 50*l*. It is also clear that the point in *Simpson v. Lamb* was raised upon the question as to the rights of third parties. The definition cited from Bacon is correct: and, if in the present case the purchaser had had no interest in the continuation of the suit, it may be allowed that there would have been no champerty. But he had in fact the management of the suit, which, at the time of the purchase, had proceeded only as far as the verdict.

WILLIAMS, J.—We are all of opinion that the judgment of the Court of Queen's Bench should be affirmed. It is argued for the defendants that, even assuming the conveyance of 11th of July, 1857, to be objectionable, *still the plaintiff has no cause of action against the [*824 defendants, because all that the sheriff has done, since the delivery of the possession under the *habere facias*, has been to execute a

contract of sale and an assignment of the term, which acts are not a foundation for an action of trespass, or for any other. If it were necessary to decide whether a mere contract in execution of a supposed authority to sell is actionable, that is a question which might require consideration. A vendee who takes possession is set in motion by the vendor, and may be treated as his agent, so as to make the vendor liable. The present case, however, does not admit of that view, because the vendee did not take possession till after action brought: and there might have been a difficulty, except for the understanding between the parties that the judgment of the court below must be considered right if there be any ground on which the action is maintainable. Now we are of opinion that, at all events, an action of trespass is maintainable for the seizure by the sheriff on 23d July, by reason of the relation of the plaintiff's title to the time when his right accrued. That is the ordinary doctrine on which actions for mesne profits are founded: you look to the date of the title, and, after entry, consider the party entitled to have been then in possession. But it is further said that, as Walton's possession had relation to his title, *he* must be deemed to have been in possession, as mortgagor, at the date of the sheriff's seizure. We think, however, that the transfer of possession by Walton to the plaintiff had also relation to the date of the plaintiff's title, so as altogether to override the execution. It remains, then, to consider whether the deed of 11th July, 1857, is bad as amounting to champerty or maintenance, *825] or on the general ground of public policy. It has been in vain attempted to find language used in any of the statutes which is applicable to the present case. It is true that the words of ancient Acts of Parliament have, in the construction of them, been extended to a sense wider than has been warranted by their actual language. But we cannot find any authority on the construction of these statutes to show that there is either maintenance or champerty in such a case as this. Maintenance is where any man gives or delivers to another, that is plaintiff or defendant in any action, any sum of money or other thing to *maintain* his plea, or takes great pains for him when he hath nothing therewith to do. See *Termes de la Ley*, *Maintenance*. Champerty is a species of maintenance, being a bargain with a plaintiff or defendant to divide the land, *campum partiri*, or other matters sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense. See *Russell on Crimes*, Book II. ch. 20.(a) The present transaction certainly does not fall within either of these definitions. I am willing, however, to admit that there would be a strictness which could not be approved of in confining ourselves rigidly to the definition, if it were made out that there was an undertaking, before or after the action was brought, that the attorney should have the estate, or a share in it, in consideration of his future labours. But here the bargain is confined to the payment of fees already due; a most important consideration. Looking at that, let us see how the question has been considered in modern cases. In **Prosser v. Edmonds*, 1 Y. & C. Exch. Eq. 481, 497,† Lord Abinger says: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed

to enforce." That principle does not apply to the present case, because here the object of taking the security was to enable the attorney to recover fees which he had already earned. Lord Abinger's observation is cited with approbation by the Master of the Rolls, Sir J. Romilly, in *Cockell v. Taylor*, 15 Beav. 103, 116, which case also is itself an authority on the point. The Master of the Rolls says: "During the argument, I stopped the defendant's counsel on the question of the objection raised to this transaction, on the ground of champerty. In my opinion, little need be said on this subject. If this were the case of the sale of a right to sue,—as for instance, if the plaintiff Collett had, before the institution of the suit of *Collett v. Preston*, sold any right he might have to set aside the deed of December 1848,—it might have been affected by the rule of law which relates to champerty; but this deed is the sale by a person of his interest in a fund in Court. The distinction between those cases is well pointed out by Lord Abinger in *Prosser v. Edmonds*, 1 Y. & C. Exch. Eq. 497.†" These authorities fully establish that in the transaction before us there is nothing of champerty or maintenance. We are then to consider whether, if it be neither of these, the transaction is illegal as contrary to general public policy. We have been *pressed with the decision in *Simpson v. Lamb*, 7 E. [827 & B. 84 (E. C. L. R. vol. 90). No doubt the Court there treated as voidable an absolute sale to the attorney. The case is recognised by Lord Justice Turner: (a) but he goes on to say that it was distinguishable from that then before him: "There the purchase was by the attorney from the client of the subject-matter of the suit in which he was attorney." Again, the Court of Queen's Bench itself has distinguished this case from *Simpson v. Lamb*, on the ground that here the transaction was not a sale, but a security for fees due before the conveyance was executed. The Court therefore, which appears for the first time to consider the purchase by an attorney of the subject matter of a suit during its pendency voidable on the general ground of its being contrary to public policy, has itself declared that this is inapplicable to the case of a security for a debt already due. One contract may be contrary to public policy, the other not. It often happens that, unless the attorney who conducts the suit continues to do so, the plaintiff has not the means of going on. An attorney there would have such strong influence over his client as to make it dangerous to allow a purchase by a party having so much power to dictate the terms. But that is very different from the case of a debt already due in respect of costs subject to taxation, where the attorney gets nothing but a security for a just debt. Therefore the Court that held one contract illegal might well hold the other legal: and we see no reason for differing from that distinction. We need not say whether we go the *whole length of the Court of Queen's Bench [828 in *Simpson v. Lamb*. It is enough to say that, assuming that decision to be right to the full extent, the plaintiff is here nevertheless entitled to our judgment.

BYLES and KEATING, Js., and BRAMWELL and CHANNELL, Bs., concurred. (WILLES, J., and MARTIN, B., had left the Court during the argument.) Judgment affirmed.

(a) *Knight v. Bowyer*, 2 De G. & J. 445.

Ex parte LEES. June 12.

Where, upon an indictment in a colonial court proceeding by course of common law, the prisoner has been convicted of a criminal offence, and is in execution of the sentence, the Court of Queen's Bench will not grant a writ of error to bring up the record of the conviction unless the Attorney-General has issued his fiat for a writ of error.

Nor will the Court, without such fiat, direct a certiorari to issue for the purpose of bringing up the record, and bringing a writ of error upon it.

A writ of habeas corpus is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of the common law.

THIS was an application for a writ of error, or for a certiorari, or for a writ of habeas corpus, for the purpose of quashing the conviction of Charles Frederick Lees by the Supreme Court of the Island of St. Helena. A certified copy of the record was sent over by order of the Secretary of State for the Colonies. The material parts were as follows.

"Supreme Court of St. Helena, Island of St. Helena, to wit. Be it remembered that, at the Criminal Sessions of the Supreme Court of the Island of St. Helena, holden at James Town, in and for the said Island of St. Helena, on the 1st day of October, A. D. 1856, before William Wilde, Esq., Chief Justice of the Supreme Court of the said Island, by *829] the oaths of" (here followed the names *of nineteen jurors), "then and there impannelled, sworn, and charged to inquire for our said Lady the Queen, and for the body of the said Island, it is presented" "that Charles Frederick Lees, late of the Island of St. Helena, mariner, on the 11th day of July, in the year of our Lord 1856, with force and arms, upon the high seas, and within the jurisdiction of this Court, in and on board of a certain ship or vessel called The Senator, in and upon one Thomas Spring Burch, in the peace of God and of our Lady the Queen then and there being, did make an assault;" charging the said C. F. Lees with firing a pistol at the said T. S. B., "with intent then and there and thereby feloniously, wilfully, and of his malice aforethought, the said T. S. B. to kill and murder, against the form of the statute," &c., "and against the peace," &c. The second, third, and fourth counts laid the assault as made with intent to maim, to disable, and to do grievous bodily harm, respectively. "And afterwards, to wit, on the 2d day of October, in the year and reign aforesaid, before our said Chief Justice of the said Session of the said Island, the said Charles Frederick Lees is arraigned, and to the said indictment and charges saith that he is Not guilty. And thereupon the jurors by the sheriff for this purpose impannelled and returned, to wit," &c., "good and lawful men of the body of this Island, being called, came, who, being selected and sworn to speak the truth of and concerning the premises, upon their oath say that, as to the premises and charge in the first, second, and third counts of the said indictment respectively charged as aforesaid, the said Charles Frederick Lees is Not guilty; and, as to the said fourth count thereof, that the said Charles Frederick Lees is *830] Guilty of the same (that is to say, of assaulting with *intent to do grievous bodily harm). Whereupon our said Chief Justice then and there passed upon the said Charles Frederick Lees the sen-

tence of imprisonment in Her Majesty's gaol at St. Helena for the term of three years."

By a royal Order in Council, dated 12th October, 1835, reciting that, by an Act of Parliament (3 & 4 W. 4, c. 85), intituled "An Act for effecting an arrangement with The East India Company, and for the better government of His Majesty's Indian Territories, till the 30th day of April, 1854," it was, among other things, enacted (a) that the Island of St. Helena, and all forts, &c., in the said Island, should be vested in His Majesty, his heirs and successors, and the said Island should be governed by such orders as His Majesty in council should from time to time issue in that behalf, it was ordered that, until further provision in that behalf, all the by-laws of the East India Company, and all other laws in force in the Island, should remain in force; and that the powers and authorities vested in the governor for the time being administering the government of the said Island under the said Company should be vested in such person as should be specially appointed by His Majesty to be governor or lieutenant-governor of the said Island.

It was further ordered, that it should be lawful for the said governor or lieutenant-governor to make and promulgate such laws and ordinances as should be necessary for the good government of the said Island, and to make any by-laws of the said Company or other laws theretofore in force there, subject to His Majesty's confirmation.

By a royal Order in Council, dated 13th February, 1839, it was ordered that there should be in the said *colony of St. Helena a [*831 court which should be called the Supreme Court of St. Helena, which said Court should be a Court of record; and that the said Court should consist of and be holden before a judge, who should be called the Chief Justice of the Supreme Court of St. Helena.

It was further ordered, that the Supreme Court should have cognisance of all pleas and jurisdictions in all causes, whether civil, criminal, or mixed, arising within the said colony, with jurisdiction over all the Queen's subjects, and all other persons whomsoever, residing and being within the said colony; and that the said Supreme Court should have full power, jurisdiction, and authority to judge and determine all questions there arising according to the laws then in force within the said colony, and all such other laws as should at any time thereafter be, by lawful authority, made and established for the peace, order, and good government thereof.

It was further ordered, that it should be lawful for the said Chief Justice to frame, constitute, and establish (subject to Her Majesty's approval) rules, orders, and regulations concerning the Court, and touching the forms and manner of proceeding to be observed therein, and the practice and pleading upon all actions, suits, and other matters, both civil and criminal, &c.

The said Court had been previously constituted by an ordinance of the governor, dated 18th December, 1837, for which was afterwards substituted an ordinance of 4th August, 1838.

By an Admiralty Commission, issued on 24th October, 1843, reciting several Acts of Parliament passed in the reigns of King Henry the Eighth, King George the Third, and King George the Fourth, one of them being stat. 7 G. 4, c. 38, "To enable Commissioners for trying

*832] *offences upon the sea, and justices of the peace, to take examinations touching such offences, and to commit to safe custody persons charged therewith," the Chief Justice of St. Helena was, among others, appointed a Commissioner to take such informations and make such commitments, and also, in connection with certain other officers of the colony, "to inquire, upon the oath of good and lawful men" of the Island, "and by other ways, means, and methods," "whereby the truth of the matter may be better known and inquired into, concerning all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences whatsoever done and committed upon the sea, or in any haven, river, creek, or place where the admiral has power, authority, or jurisdiction," "and to hear and determine all the offences aforesaid according to the laws and customs of this our realm, and the statutes hereinbefore mentioned, and all other statutes in that behalf made and provided."

Flood, on a previous day in this term, (a) appeared in support of the application.—A writ of error can issue from this Court to St. Helena. [Lord CAMPBELL, C. J.—Have you obtained the fiat of the Attorney-General?] No. But a writ of error is the proper course to take for the purpose of quashing this conviction. The laws of England apply to St. Helena, and are not affected by any by-laws enacted by the local government there. [He referred to *The Laws of St. Helena*, published by authority of the English Government.] Even where a colony has the privilege of making, to some extent, its own laws, a writ of error *833] lies from the mother country *to reverse a judgment in the colony. In *Craw v. Ramsey*, Vaughan 274, 290, it is laid down that "a writ of error lies to reverse a judgment in any dominions belonging to England," stating, as an example, that there were precedents of writs of error from England to reverse judgments given in Calais, then a part of the English dominions: and reference is there made to Calvin's Case, 7 Rep. 1 a, 20 a, in the report of which case Lord Coke takes the distinction between writs of a "mandatory" nature, which lie to any dominions of the Crown, and those of a "remedial" nature, which lie only to any part of England. [Lord CAMPBELL, C. J.—Does the rule apply to criminal as well as civil cases?] It does. [ERLE, J.—To whom would the writ of error be directed in this case?] To the Chief Justice of St. Helena. But the application is, in the alternative, for a certiorari, in order to bring the record into Court, so that there may be a writ *coram vobis*, if the Court should be of opinion that a writ of error will not, under the circumstances of the case, lie to St. Helena in the first instance. A certiorari may issue for that purpose: 2 Hal. Pl. C. 210, c. xxvii.; or a writ of habeas corpus might issue to bring up the prisoner, and raise the question of the validity of the conviction in that way.

Further, the indictment is bad. (The argument upon this point is omitted.)

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

*834] *This was an application for a writ of error or certiorari to be directed to the Supreme Court of the island of St. Helena, to bring before the Court of Queen's Bench in England the record of a conviction alleged to be erroneous. Some old precedents of writs, issued

(a) Monday, June 7th. Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, J.

out of this Court to the French dominions of our early English Sovereigns, were cited to show that such writs might lawfully issue. No precedent, however, of any such proceeding with respect to a dependency like St. Helena, for several centuries, was brought before us; and it was not at all explained in what manner our writs of error, certiorari, or habeas corpus could be enforced in such dependencies.

Without, however, deciding how far we might be empowered to issue such a writ, we are clearly of opinion that we ought not to direct such a writ to issue in the present case. We had occasion to consider, some few terms since, the question as to this Court ordering a writ of error to issue in a criminal case without the fiat of the Attorney-General; and we then refused to order a writ to issue without such fiat.^(a) It is a part of the prerogative of the Crown, that a writ of error should not issue except with the concurrence of the Crown, testified by the fiat of the Attorney-General. It is the function of the Attorney-General, and not of this Court, to decide whether a writ of error should issue in each particular case. We see no reason why the same rule should not apply in the case of a conviction in the colonies. The reasons are, in our opinion, stronger against issuing such a writ to the colonies than against doing so to a Court in this country. The inconveniences against which the rule of requiring the Attorney-General's fiat seemed to *guard [835 would obviously be much greater in the case now before us than in the former case, which was an application for a writ of error to the Central Criminal Court. It is said, however, that we ought to issue a writ of certiorari to remove the record into this Court, and that a writ of error coram vobis might then be obtained. There is some trace of writs of certiorari having in some cases been issued to bring up the records of inferior Courts for the purpose of quashing them on a subsequent writ of error. The proper and almost uniform course, however, in modern times has been to proceed by writ of error, after judgment in a court proceeding, as the Court of St. Helena is alleged to have done, by the course of our common law. The writ of certiorari may be used as ancillary to a writ of error for the purpose of bringing up some proceedings not returned on the writ of error, on diminution being alleged; and, perhaps, in some rare cases, for the purpose of a writ of error being brought afterwards; but we think that we ought not, in a criminal proceeding, after judgment, and when the party is in execution of a sentence, to grant such a certiorari, unless under very peculiar circumstances, and to prevent manifest injustice, where there is no fiat of the Attorney-General for a writ of error. Supposing that we granted a certiorari, and the writ were obeyed, and the record removed here, we do not see what we could properly do with it unless a writ of error were granted, which we think ought not to issue without the sanction of the Attorney-General. It is not our duty to say that a writ of error should be granted: and we ought not, in the exercise of our discretion, to grant a certiorari which may have the effect of interfering with the prerogative *of the Crown. A writ of habeas corpus, to the expediency of [836 granting which we have also directed our attention, is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of the common law. And, even supposing it could run to St. Helena, it could only be

(a) See *Ex parte Newton*, 4 E. & B. 869 (E. C. L. R. vol. 82).

useful as ancillary to or accompanying a writ of error, as it is only by writ of error that such judgment, according to the course of the common law, can properly be reversed: until the judgment be reversed, the prisoner ought not to be discharged. For these reasons we think that we ought not to interfere.

It is alleged, on the part of the prisoner, that the proceedings were upon a repealed statute, and that there were errors in the judgment and hardships and irregularities in the proceedings. If such allegations are well founded, and obstacles are found to prevent any remedy by appeal to the Privy Council, or by writ of error to this Court, we apprehend that the advisers of the Crown will take the matter into their consideration, and form their judgment with respect to any alleged error, wrong, or hardship which may be brought before them; and, if any such be established to their satisfaction, will advise the Crown to give the relief to which they may think the applicant entitled, by pardon or mitigation of punishment. We have no authority to interfere.

Rule refused.

***837] *GARTON v. The GREAT WESTERN Railway Company.**
June 12.

The Great Western Railway Company, by the Act (5 & 6 W. 4, c. cvii.) incorporating them, were to have two termini, one at Bristol, the other at Paddington in Middlesex; two general half-yearly meetings were to be held, one at Bristol, the other at Paddington; an equal number of directors was to be chosen from the residents near each place. All the general business was transacted at Paddington, where the secretary resided, and where orders were issued. Held, by the Court of Q. B., that Paddington was the only "principal office" of the company within sect. 138 of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20. By the Incorporating Act it was provided that no action should be brought "against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the powers or authorities or any of the orders made, given, or directed in, by, or under this Act," without certain notice. To a declaration against the company for money had and received, and on accounts stated, the company pleaded that the action was brought after the passing of the statute, and no notice had been given pursuant to the statute. After verdict, and judgment for defendants, Held, in the Exchequer Chamber, that the plea was bad, and judgment was reversed, for the want of an allegation showing that the action fell within the class described in the section.

A PLAINT in this case, having been levied in the county court of Gloucestershire holden at Bristol, in an action on contract, was removed into this Court by certiorari.

The plaintiff declared for money had and received, and on accounts stated.

Pleas. 1. That the causes of action in the declaration mentioned accrued after the coming into operation of the statute passed, &c. (5 & *838] 6 W. 4, c. cvii.(a)); "and *that no notice of the said plaint was given one calendar month before the same was levied, pursuant to the statute in such case made and provided."

(a) Local and personal, public: "For making a railway from Bristol to join the London and Birmingham Railway near London, to be called 'The Great Western Railway,' with branches therefrom to the towns of Bradford and Trowbridge in the county of Wilts."

Sect. 1 incorporates the company by the title of The Great Western Railway Company.

Sect. 5 enacts "that it shall be lawful for the said company and they are hereby empowered to make and maintain the railway and branch railways hereinafter mentioned," &c., "commencing at or near a certain field called Temple Mead, within the parish of Temple otherwise Holy

***2. Never indebted.**

Issues on the pleas.

[*839]

On the trial, before Erle, J., at the London Sittings *after last Hilary Term, the defendants, as to the issue on the first plea, [*840]

Cross in the city and county of Bristol," &c., "and terminating by a junction with the London and Birmingham Railway in a certain field lying between the Paddington Canal and the turnpike road leading from London to Harrow on the western side of the general cemetery in the parish or township of Hammersmith in the said county of Middlesex."

Sect. 118 enacts: "That the first general meeting of the said company shall be held within six calendar months next after the passing of this Act, and from and after such first general meeting of the said company, there shall be a half-yearly general meeting of the said company in the second week of the month of February and the second week of the month of August in each and every year, or within the space of twenty days next after each of such periods, and all such and so many special general meetings of the said company as the directors of the said company shall think proper to convene, or as shall be convened by the proprietors in manner hereinafter provided, of which said general meetings and special general meetings ten days' public notice at the least shall be given in the manner hereinafter directed; and every such notice of a special general meeting shall specify the purpose for which the same is called; and such first general meeting shall be held in London, and the first half-yearly general meeting shall be held in London, and all future half-yearly general meetings shall be held alternately in Bristol and London, and such special general meetings shall be held either at London or Bristol; and such first general meeting and such half-yearly general meetings and special general meetings may be adjourned from time to time, all adjournments being made to the same place where the original or preceding meeting shall have been held."

Sect. 119 enables a certain number of proprietors, holding shares to a certain amount, to require the directors "to call a special general meeting of the proprietors of the said company, either at London or Bristol, as may be expressed in such requisition, so as such requisition fully express the object for which such special general meeting is required to be called:" fourteen days' notice to be given in two or more London newspapers and in two or more Bristol newspapers.

Sect. 127 enacts: "That at the first general meeting to be held as hereinbefore is mentioned, or at some meeting to be held by adjournment therefrom, twenty-four persons who shall be proprietors, and respectively possessed in their own right of ten shares in the said undertaking, shall be elected directors to manage the affairs of the said company by the proprietors present at such meeting, either personally or by proxy, eight at least of which directors so qualified shall be proprietors residing in or within twenty miles of London, and eight at least shall be proprietors residing in or within twenty miles of Bristol."

Sect. 216 enacts: "That in all cases in which it may be necessary for any person or corporation to serve any summons or demand, or any notice, or any writ, or other proceeding at law or in equity upon the said company, personal service thereof upon a secretary or clerk of the said company, or leaving the same at the office of the said company, or of a secretary or clerk, or delivering the same to some inmate at such office of the company, or at the last or usual place of abode of such secretary or clerk, or in case the same respectively shall not be found or known, then personal service thereof upon any other agent of or officer employed by the said company, or any one director of the said company, or delivering the same to some inmate of the last or usual place of abode of such agent or officer, shall be deemed good and sufficient service of the same respectively on the said company."

Sect. 223 enacts: "That no action, suit, or information, nor any other proceeding, of what nature soever, shall be brought, commenced, or prosecuted against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the powers or authorities or any of the orders made, given, or directed in, by, or under this Act, unless twenty days' previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, information, or other proceeding to the intended defendant, nor unless such action, suit, information, or other proceeding shall be brought or commenced within six calendar months next after the act committed, or in case there shall be a continuation of damage then within six calendar months next after the doing or committing such damage shall have ceased, nor unless such action, suit, or information shall be laid and brought in the county or place where the matter in dispute or cause of action shall arise; and the defendant in such action, suit, information, or other proceeding may plead the general issue, and give this Act and the special matter in evidence, at any trial to be had thereupon, and that the acts were done or omitted to be done in pursuance of or by the authority of this Act; and if they shall appear to have been so done or to have been so omitted to be done, or if it shall appear that such action, suit, information, or other proceeding

relied upon The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); sect. 138 of *which enacts: "That any summons or *841] notice, or any writ, or other proceeding at law or in equity requiring to be served upon the company, may be served by the same being left at or transmitted through the post directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary then by being given to any one director of the company." As to this point, it appeared on the evidence that the notice of action was served by being left with the superintendent at the office of the company at Bristol. It was proved that the general business of the company was carried on at the Paddington Station, at the Middlesex terminus, and that the secretary of the company resided there, and carried on the business there; that none of the general business of the company was carried on at the Bristol Station; and that, as to the management of the local business, there was no difference between the Bristol or any other station. And it was explained that the "general business" included all the rates of carriage and freight, all instructions by general order, and instructions given to any station master on the

shall have been brought otherwise than as hereinbefore directed, then and in every such case the jury shall find for the defendant;" &c.

Stat. 6 & 7 W. 4, c. lxxvii., local and personal, public, "For making a railway from Cheltenham and from Gloucester, to join the Great Western Railway near Swindon, to be called 'The Cheltenham and Great Western Union Railway,' with a branch to Cirencester," contains, sect. 215, a provision as to notices, &c. to be served on The Cheltenham and Great Western Union Railway Company corresponding exactly with sect. 216 of stat. 5 & 6 W. 4, c. cvii., except that the words "the secretary" are used instead of "a secretary," and that the words "or director" are added after "such agent or officer."

Stat. 2 & 3 Vict. c. xxvii., local and personal, public, "To amend the Acts relating to 'The Great Western Railway;' and to raise a further sum of money for the purposes of the said undertaking," enacts, sect. 36, "That nothing herein contained shall be deemed or construed to exempt the railway by this or the said recited Acts authorized to be made from the provisions of any general Act relating to railways which may pass during the present or any future session."

Stat. 7 & 8 Vict. c. iii., local and personal, public, "To amend the several Acts relating to the Great Western, the Cheltenham and Great Western Union, and Oxford Railways; to amalgamate the two last-mentioned railways with the Great Western Railway; and to authorize the formation of additional works at Cheltenham by The Great Western Railway Company," recites, in sect. 54, the 223d section of stat. 5 & 6 W. 4, c. cvii., and enacts, "That the same shall be and is hereby repealed, except so far as the same relates to the notice thereby required to be given of any such action, suit, information, or other proceeding."

Stat. 10 & 11 Vict. c. ccxxvi., local and personal, public, "For making branch railways from the Great Western Railway to Henby and to Radstock; to widen certain portions of the Great Western Railway; to enable The Great Western Railway Company to purchase or amalgamate with the Birmingham, Wolverhampton, and Dudley Railway, and to purchase the Wycombe and Great Western and Uxbridge Railways; and for other purposes," enacts, by sect. 1, "That all the provisions, matters, and things contained in the said several Acts relating to The Great Western Railway Company so far as the same are now unrepealed and in force, and are not inconsistent with or altered by the provisions of this Act, and save in so far as the same may be inconsistent with the provisions of The Lands Clauses Consolidation Act, 1845, and of The Railways Clauses Consolidation Act, 1845, shall extend to this Act, and to the several purposes thereof, as fully and effectually as if the same provisions, matters, and things were repeated and re-enacted in this Act, and had specific reference thereto; and the railways and works by this Act authorized to be made by the said Great Western Railway Company shall, when so made, form a part of the undertaking of the Great Western Railway."

Sect. 2 enacts: "That the provisions of 'The Lands Clauses Consolidation Act, 1845,' and 'The Railways Clauses Consolidation Act, 1845,' in so far as the same may be applicable, and are not inconsistent with the provisions hereinafter contained, shall be incorporated with and form part of this Act."

line. Half-yearly general meetings were, however, held alternately at Paddington and Bristol, under sect. 118 of stat. 5 & 6 W. 4, c. cvii.; and, when the half-yearly meetings were *held at Bristol, the [*842 directors and secretary used to go down thither for the purpose of attending. It further appeared that the station at the Bristol terminus was very important in point of traffic. The learned Judge directed a verdict for the plaintiff on this issue, reserving leave to move as after mentioned. On the other issue also the plaintiff had a verdict.

Montague Smith, in last Easter Term, obtained a rule calling on the plaintiff to show cause why a verdict should not be entered for the defendants, on the following grounds: "that no notice of action was given to the defendants; that the notice relied on by the plaintiff was not duly served on the defendants."

In this Term, (a)

Knowles and Griffiths showed cause.—The notice may have been transmitted to London on the day on which it was served. But, in the first place, Bristol is "one of" the "principal offices" of the Company, within the meaning of sect. 138 of The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20. Stat. 5 & 6 W. 4, c. cvii., which created the company, manifestly, by sect. 118, put the two terminal stations on the same footing. Further, sect. 223 of the last-mentioned Act does not make the notice necessary at all: it relates only to actions brought against a "person," not to actions brought against the corporation itself. Again, it may perhaps be true that, by virtue of sect. 36 of stat. 2 & 3 Vict. c. xxvii., the company is liable to all that the later general Act, The Railways Clauses Consolidation Act, 1845, imposes. But sect. 138 of The Railways *Clauses Consolidation Act, 1845, does not [*843 make the particular form of service necessary: it only makes it good: in fact the enactment is enlarging, not restrictive. It is merely cumulative. The service seems to be good under sect. 216 of stat. 5 & 6 W. 4, c. cvii., which is incorporated with the later Acts.

Montague Smith and Raymond, contra.—It is questionable whether sect. 138 of The Lands Clauses Consolidation Act, 1845, has a retrospective operation, even under the later Acts relating to this railway. But, if it has such operation, what has taken place here is not a compliance with its provisions. It is clear, upon the evidence, that the company has but one "principal" office, that at Paddington, where the secretary resides and the general business is carried on, and where orders are issued. The provision for holding the half-yearly meeting once in the year at Bristol cannot make the office there a principal office. The convenience, too, is much in favour of this construction: the notices should be served at the place where steps must be directed to be taken, if necessary, in consequence of the notices. *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

In this case the notice of action was served on the superintendent of the Bristol station.

The statute, 8 & 9 Vict. c. 20, s. 138, enacts that any summons or notice, or any writ or other proceeding at law or in equity, may be served by the same being left at or transmitted through the post, directed to the principal office of the company, or one of their *principal [*844 offices where there shall be more than one, or being given per-

(a) May 31st. Before Lord Campbell, C. J., and Coleridge and Erle, Js.

sonally to the secretary, or, in case there be no secretary, by being given to any one director.

The evidence showed that, in the first statute for making the Great Western Railway, the Bristol terminus was, in many respects, on a par with the London terminus, as in respect of the number of directors who were to come from its vicinity, and of the half-yearly meetings of the company. It also showed that the Bristol station was very important in respect of the quantity of traffic. But, for the other side, it showed that Bristol had no office different in kind from the office to be found at every station on the line; that the principal office of the railway was in London; and at that office alone the staff of the company was stationed, and the central government of the railway carried on. That the secretary was there, and the ordinary meetings of the directors for the general purposes of the company were there held.

Upon this evidence, we are of opinion that the London office was the only principal office of the company, and that service at the Bristol station was not service within the section above recited.

The documents which may be thus served are of powerful legal effect; and the service is an important fact. The provision for the protection of a company spread over a wide surface, and having many servants, requires that the documents should be so sent as that they could be acted on by the proper officer without delay. The superintendent of traffic at a country station will be probably ignorant of, and unused to, legal matters: and, if the amount of traffic created a principal office, the *845] description would be inconveniently indefinite. *The words "the principal office" indicate one particular office for the whole line, not an office for a traffic station.

If it be said that the notice so served would probably be forwarded, and that redress should be facilitated, the answer is that the experience of Courts abundantly proves the necessity of protecting railways from groundless litigation; and the Legislature has given the protection in question. In The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 134, and The Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, s. 135, there is the same provision for service of legal proceedings. The Legislature has always required service at a principal office, or personally on the secretary, or, if no secretary, on a director. The construction of the enactment must be the same for each statute: and we think we best give effect to the expressed intention of the Legislature in holding, on this evidence, that Bristol was not the principal office.

Therefore the rule must be absolute for entering a nonsuit.

The verdict was entered for the defendants on the first issue,^(a) and for the plaintiff on the second; and judgment was given that the defendants should go without day.

(a) See the form of the rule *Nisi*, ante, p. 842.

*IN THE EXCHEQUER CHAMBER. [*846

GARTON v. The GREAT WESTERN Railway Company.

[May 13, 1859.]

[For syllabus, see ante, p. 837.]

THE plaintiff alleged error, in the Exchequer Chamber, in the above judgment. The defendants denied the error.

Knowles, for the party alleging error (plaintiff below).—The Court below has decided on the effect of stat. 8 & 9 Vict. c. 20, s. 138, and has held that the service of the notice does not satisfy the requisites of that section. That is sufficient to justify the entering of the verdict for the defendants on the first issue. But the plaintiff now contends that the plea upon which that issue is taken offers no answer to the action, and that he is therefore entitled to reverse the judgment which has been given for the defendants. Supposing sect. 223 of stat. 5 & 6 W. 4, c. cvii., to make it necessary to give any notice in this case, still the section can scarcely be considered in force since stat. 5 & 6 Vict. c. 97, s. 4, which fixes the time of notice in all cases at one calendar month, stat. 5 & 6 W. 4, c. cvii., s. 223, having fixed the time at twenty days. But, further, no notice at all was necessary.

The Court then called on

Montague Smith, for the party denying error *(defendants [*847 below).—The question arises after verdict, though the plaintiff has not chosen to move for judgment non obstante veredicto. The words of the first plea are important: that no notice was given “pursuant to the statute in such case made and provided.” It must now be assumed that the cause of action was one in which the statute required a notice: Chitty on Pleading, I. 705 (7th ed., by Greening). If no notice were required, there could have been no verdict for the defendants. [MARTIN, B.—Was that to be decided by the Judge at Nisi Prius?] It was. [WATSON, B., referred to Wallington v. Dale, 6 Exch. 284,† as showing that the issue raised only the question of notice in fact. BRAMWELL, B.—Does the plea mean more than that there was not that notice which the statute requires when it does require a notice?] The Judge, if no notice were required, would have told the jury that the plea was not sustained. [WILLES, J.—It strikes me that it would have been very awkward for the jury to find that such notice as the statute requires was given, on the ground that the statute requires none. BRAMWELL, B.—If you had pleaded that the action was for a thing done or omitted in execution of the Act, must not the jury have found against you? WILLES, J.—How could a jury have found that you were acting bona fide under the Act?] Surely the Court cannot say, as a matter of general law, that there can be no claim made upon the company for money had and received in which they are entitled to a notice of action. [MARTIN, B.—Suppose I pay the company for the carriage of goods, and the consideration wholly fails. Or suppose the company choose to sell goods which I have left on the *premises.] In that case, [*848 they would not be acting as a company. [MARTIN, B.—Suppose [*848 they upset a train by negligence, and do injury.] They would be sued only as tort-feasors, as any common carrier might be for not carrying

safely. In *Kent v. The Great Western Railway Company*, 3 Com. B. 714 (E. C. L. R. vol. 54), this 223d section of stat. 5 & 6 W. 4, c. cvii., was discussed. The company was sued for money had and received, on the ground of their having obtained money by charges which were extortionate under the provisions of the Act: and it was held that they were entitled to notice of action.

MARTIN, B.—We are all clearly of opinion that the plea is bad. The action is for money had and received; the meaning of which is, that the defendants received the money under such circumstances that there was either an express or implied promise to repay it: and there is a claim upon accounts stated; which means that the parties met, and that the balance was found to be against the defendants, who engaged to pay it. To this it is pleaded that the cause of action arose after the passing of stat. 5 & 6 W. 4, c. cvii., and that no notice was given “pursuant to the statute in such case made and provided.” In this section we find the provision which is ordinarily inserted in the Acts which parties procure for themselves, and which requires notice of action “against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the powers or authorities or any of the orders made, given, or directed in, by, or under this Act.” It is quite absurd to say that these words could apply to an action for money had and *received, or upon an account stated. I am not prepared to *849] say whether the decision in *Kent v. The Great Western Railway Company* be right or wrong: the question there came on as a dispute about costs; and all I collect from the report is that the company, having had the benefit of the notice of action, could not fairly resist the claim as to the costs of such notice: the Court there probably thought that the company were attempting an injustice: the decision may be right or wrong; but there was no judgment given upon the point before us: if there had been, we might have wished to take time for considering our own judgment. I may add that the point upon which we are now deciding was not decided upon by the Court below.

WILLES, J.—I also am of opinion that the plea is bad for want of an averment that the action is brought “against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the powers or authorities or any of the orders made, given, or directed in, by, or under this Act.” Unless this be shown, there is no foundation for the defence. As for *Kent v. The Great Western Railway Company* (whether that case be good law or not), it is stated, in the report in the *Law Journal*,^(a) that the company there had actually pleaded that they had not notice of the action: they therefore acted ungraciously in moving to deprive the plaintiff of the costs of the notice. With respect to the remarks made by Mr. Justice Coltman and Mr. Justice Maule, to *£50] the effect that the charge in the action there was for a thing done under the Act of Parliament, that can scarcely apply to the case of an account stated; nor can it apply to all cases of money had and received; for instance, if the company sell goods left on their premises, they would be liable to such an action, as might have been in the well known case decided against The Bank of England,^(b) if the

(a) 16 L. J. N. S. C. P. 72.

(b) See *Coles v. The Bank of England*, 10 A. & E. 437 (E. C. L. R. vol. 37).

tort had been waived. It is, however, suggested here that the want of the averment is supplied by the words of the plea "pursuant to the statute." That cannot be sustained: the jury could not, on this issue, find that there was a notice because no notice was required. The Court of Queen's Bench has pronounced no judgment on this point. I am of opinion that the plea is not good.

BRAMWELL, B.—The notice is required only in the case of some act or omission warranted, or supposed to be warranted, by the statute. The question is always whether there was bona fides. The plea, to be good, must, in express terms or by implication, show the thing done or omitted to be under the Act. Whether, in *Kent v. The Great Western Railway Company*, the thing complained of was in pursuance of the Act, I do not presume to say. I myself never could understand why a railway company was to receive this protection more than any other party. But, however that be, at any rate here is not in express terms such an allegation as is required. Mr. *Smith* says it is implied. But why so? There is nothing in the plea to necessitate such an implication: it merely says that there was no notice *pursuant to the statute. To my mind, that means only such notice as there [851 ought to be when notice is required. That does not fill up the allegation that a notice ought to be given. I should be sorry to think this a formal objection: the allegation seems to me very substantial.

WATSON, B.—I am of the same opinion. *Wallington v. Dale*, 6 Exch. 284,† shows that the issue raises only the question whether there was a notice in fact. There is no allegation raising the question whether the action is within the section.

BYLES, J.—I am of the same opinion. The Legislature might have enacted that no action should be brought without notice; but it provides only that some shall not: and it follows that some may. Then is this within the words? The action cannot be said to be for anything done or omitted in pursuance of the Act: and it will be found that the more numerous cases of actions against railway companies require no such notice.

Judgment reversed.

*The QUEEN v. JOSEPH NUNNELEY. *June 12.* [*852

Under the proviso in sect. 7 of stat. 53 G. 3, c. 127, if a party, summoned before justices for non-payment of a church-rate, gives notice that he disputes the validity of the rate, and the justices nevertheless proceed, alleging that they do not believe the objection to be made bona fide, and make an order for payment, this Court, on the order being brought up by certiorari, will quash it, upon affidavits showing that the justices had no reasonable ground for disbelieving the bona fides.

WILLS, in this Term, obtained a rule calling on the prosecutors in this case to show cause why an order made by Charles Henry Cust, Geoffrey Palmer, and William Ward Tailby, Esquires, three justices of Leicestershire, on 20th April, 1858, which had been brought up by certiorari, should not be quashed.

From the affidavits on which the rule was obtained, it appeared that, on 11th February last, a vestry was held in the parish of Market Harborough, Leicestershire, for the purpose of making a church-rate. An

estimate was produced by the churchwardens; when* an objection was taken to the first item (a sum to be paid to the parish clerk, by way of salary); and it was moved and seconded that the item should be struck out. The chairman refused to put this resolution, or to allow a minute to be taken as to its having been proposed, stating that he would not allow any resolution as to the estimates to be put until a rate had been proposed and seconded. A protest was then handed in to the chairman, as to the illegality of the proceedings, by one or more rate-payers. A resolution was then proposed and seconded, to the effect that the funds required should be raised by voluntary contribution. This the chairman refused to put. A motion was then made that a four-penny rate should be granted. An amendment was put and seconded, that no rate be granted. This amendment was put, and lost by a show of hands. A *853] poll was *thereupon demanded. The chairman refused to allow such poll to be taken, and put the original resolution to the meeting; and on this a poll was taken, though the mover of the amendment stated, at the time of moving it, that he had other amendments to propose in the event of his amendment not being carried. The chairman declared that the rate of fourpence in the pound was carried. A considerable number of the parishioners, including Joseph Nunneley, believing that the above alleged irregularities were fatal to the rate, refused to pay it: and reference was made, in one of the affidavits, to a former rate, as to which a somewhat similar objection had arisen; and which had not been enforced; and on which the opinion of counsel had been taken.

Nunneley, having been summoned before the magistrates named in the rule, for non-payment of the rate, was called upon to answer the demand. He answered that he believed the rate to be illegal, and was prepared to establish that in a proper court; but that his taking that ground deprived the Bench of jurisdiction. He was asked by the justices to state his legal objections, but replied that he would rather not give them, as the Bench could not decide upon their validity: but the justices told him that, if he did not state the objections, they would make an order for payment of the rate. He then stated that resolutions and amendments had been proposed, but that the chairman had refused to put them. The opposing attorney called upon him to produce the resolutions and amendments; but, upon oral evidence being offered, insisted that it could not be given in the absence of the minute-book: and the minute-book, when produced, contained no entry of the amend- *854] ments on the resolutions in question. The justices then *dis- allowed the objection, and declined to look at the legal opinion which had been given on the former rate, and which Nunneley now offered to show them. Nunneley then handed to them the following notice. "I hereby give you notice that I dispute the validity of the church-rate now in question, and my liability to pay the same. April 20th, 1850. JOSEPH NUNNELEY." Nunneley was then asked by the justices, whether he was prepared to swear that he had a *bonâ fide* objection to the validity of the rate: he replied in the affirmative; and the book was handed to him; but he was not sworn. He then again declared that, as he objected to the rate *bonâ fide*, the justices had no power to adjudicate; and he handed in the following notice. "I give you notice that I dispute the validity of the church-rate now in question,

owing to various irregularities which were committed by the chairman at the meeting for laying the said rate, and subsequently on taking the poll; and that I am advised by counsel that such rate is illegal; and I further give you notice that, if any distress-warrant is granted against me, I shall sue you at law for damages. JOSEPH NUNNELEY."

The justices then said that they should make an order upon Nunneley for the payment of the rate and expenses.

The order was accordingly drawn up, and signed and sealed by the three justices. It recited a complaint to a justice, by the churchwardens of Market Harborough, that Nunneley refused to pay them "the sum of 1*l.* 16*s.*, being the sum to which the said Joseph Nunneley is duly rated and assessed in the churchwardens' rate for church-rates for the said parish of Market Harborough, made the 11th day of February, 1858; the validity of which said rate hath not yet been questioned in any *ecclesiastical Court; and which sum of 1*l.* 16*s.* is now [*855 justly due from the said Joseph Nunneley unto them," the churchwardens. It recited also a summons under the hand and seal of the justice to appear before the justices of the county; that Nunneley had accordingly appeared before the three justices named in the rule, "and hath not showed to us any sufficient cause why the said sum of 1*l.* 16*s.* should not be paid: We the said justices, therefore, having duly considered the premises, and having also duly examined into the merits and truth of the said complaint upon oath, do find that there is justly due the aforesaid sum of 1*l.* 16*s.* from the said Joseph Nunneley to the said" churchwardens, "and do order and direct the aforesaid Joseph Nunneley" to pay the same to the churchwardens, with 7*s.* 6*d.* costs. Nunneley not having paid the sum, a distress-warrant issued, under which a distress was levied on the goods of Nunneley.

Nunneley now deposed to the truth of what he said before the magistrates, "and that I did believe, when I was before the said justices, and I do believe now, that the said church-rate was invalid; and I did and do, truly, conscientiously, and bonâ fide, dispute the validity of the said rate." It further appeared that Nunneley, before he appeared at the petty sessions, had been advised by his attorney that the rate was bad on account of the irregularities committed at the laying of the same.

In answer, each of the three justices named in the rule made affidavit: "That, before proceeding to make the said order, I did duly consider and weigh the allegations of the said Joseph Nunneley that he disputed the validity of the said rate, and the two several written notices to that effect handed to the Bench by the said Joseph Nunneley, as mentioned in his said affidavit; and *that I did, together with my said fellow-justices, consider and determine that the said allegations [*856 and notices of the said Joseph Nunneley were not made or given in good faith, but were made and put forward by the said Joseph Nunneley as a pretext merely for avoiding payment of the said rate.

Macaulay and *T. Bell* now showed cause.—*Primâ facie*, the justices had jurisdiction. The objection to the validity of the rate does not put an end to the jurisdiction, under stat. 53 G. 3, c. 127, s. 7, unless it be made bonâ fide: and whether it be so made was a question of fact for the justices; and they have decided that it was not made bonâ fide. [Lord CAMPBELL, C. J.—There ought surely to be some ground for their decision. CROMPTON, J.—Each must act on his own judgment; but

they cannot give themselves jurisdiction by finding a fact.] They must do so, when the fact is the foundation of the jurisdiction: *Rex v. Wrottesley*, 1 B. & Ad. 648 (E. C. L. R. vol. 20). [CROMPTON, J.—The question is, whether the objection was really made *bonâ fide*; not whether the justices thought so.] The test is, whether the justices have authority to commence the inquiry: if they have, their finding as to the fact which is to give jurisdiction is conclusive: *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41). [ERLE, J., referred to *Thompson v. Ingham*, 14 Q. B. 710 (E. C. L. R. vol. 68), and *Regina v. Dayman*, 7 E. & B. 672 (E. C. L. R. vol. 90).] In *Regina v. Colling*, 17 Q. B. 816 (E. C. L. R. vol. 79), it was held that the jurisdiction was put an end to, because it appeared that the justices had believed that the rate was *bonâ fide* disputed. Lord Campbell, C. J., said: "They were not to consider *857] whether the reasons of *dispute were well or ill founded; the question for them was, whether or not the rate was *bonâ fide* in dispute." In *Dale v. Pollard*, 10 Q. B. 504 (E. C. L. R. vol. 59), it was expressly found that the justices knew that there was a real dispute as to the validity of the rate. If the decision of the justices on the fact is to be impeached, that may be done by appeal to the Quarter Sessions, under sect. 7. In *Regina v. Cridland*, 7 E. & B. 853, 869 (E. C. L. R. vol. 90), a case under the Game Act of 1 & 2 W. 4, c. 32, s. 30, Erle, J., said: "I strongly incline to the opinion that the true meaning of the statute is, that the justices ought to try whether the defendant entertained an honest belief that he had a title." And he pointed out that in *Regina v. Burnaby*, 2 Ld. Raym. 900, all the Judges "agreed that justices ought to dismiss a summons, which is to result in a summary conviction, immediately on being convinced that the case involves a *bonâ fide* claim of title to real estate." So, here, the question is, whether the justices were convinced.

Mellor (with whom was *Wills*), *contrâ*.—The objections appear to have been valid: but, at any rate, they were made *bonâ fide*; and Nunneley, when challenged to swear to his belief in their validity, accepted the challenge, which was not persisted in. It is not necessary that the objection should be valid, in such a case, for the purpose of destroying the jurisdiction: *Rex v. The Chapelwardens of Milnrow*, 5 M. & S. 248. [Lord CAMPBELL, C. J.—You would not say that the justices were deprived of jurisdiction by an objection palpably frivolous, as, for instance, that the rate was made on a Friday.] In such a case the justices ought, *858] no doubt, to disregard the *objection: but this is not an objection of that character. In *Bunbury v. Fuller*, 9 Exch. 111, 140,† COLERIDGE, J., delivering the judgment of the Court of Exchequer Chamber, said: "It is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court." *Ex parte M'Fee*, 9 Exch. 261,† is an instance of the application of the same principle: and so is *Bailey's Case*, 3 E. & B. 607 (E. C. L. R. vol. 77), where affidavits were admitted, for the

purpose of impeaching a conviction under the Masters and Servants Act, 4 G. 4, c. 34, by showing that there was no evidence before the justices from which the relation of master and servant could be inferred. (He was then stopped by the Court.)

LORD CAMPBELL, C. J.—This rule must be absolute. By sect. 7 of stat. 53 G. 3, c. 127, if the validity of the rate be disputed, and the party disputing the same give notice to the justices, the justices shall forbear giving judgment thereon, and the person demanding the rate may then proceed to the recovery of the demand, as before the statute. Thus the justices have jurisdiction only where the rate is undisputed: if it be *bonâ fide* disputed they have no jurisdiction. What they have to *decide is, therefore, Is this rate *bonâ fide* disputed? They [*859 cannot give themselves jurisdiction by deciding, without evidence, that the dispute is not *bonâ fide*. Here the evidence is all on one side. Nunneley shows them a reasonable ground for questioning the validity, the opinion of counsel, and the proceedings which took place when the rate was laid. There is no contradiction as to this. The justices say that they will not entertain the objection, but will make the order. They cannot give themselves jurisdiction by erroneously and capriciously deciding the preliminary point contrary to all the evidence. I feel much impressed by what my brother Coleridge said in *Regina v. Colling*, 17 Q. B. 828 (E. C. L. R. vol. 79), the more so as it was on a point which he has particularly examined. He says: "I do not agree that they" (the justices) "were conclusively judges whether or not the rate was disputed *bonâ fide*. It would still be for a jury to decide that point, if the matter came before them." Now here a jury certainly would say that the objections were made *bonâ fide*. To show the want of jurisdiction evidence was given which was uncontradicted: but the justices, by a capricious decision, though, it may be, on motives highly honourable, choose to say that they do not believe that the objection was taken *bonâ fide*. To allow this would be to give magistrates, in all similar cases, an opportunity to find contrary to the fact, without evidence.

COLERIDGE, J.—I am of the same opinion: and I think that the ordinary question, whether there was power in the magistrates to commence the inquiry into *the fact which was to give them jurisdiction, does not arise. In *Rex v. Chapelwardens of Milnrow*, 5 [*860 M. & S. 248, Lord Ellenborough thus described the effect of sect. 7: "A jurisdiction is created, with certain exceptions; as, first, that the amount shall not be beyond 10*l.*; in the next place, it must be in respect of a matter where the validity of the rate has not been questioned in the Ecclesiastical Court. These are matters of exception prior to the issuing of a warrant. Unless it be made to appear affirmatively before the justice that the amount is less than 10*l.*, and that no question is made upon the rate in the Ecclesiastical Court, the justice would not have jurisdiction to issue his warrant. Now in this case the jurisdiction of the justice is well initiated. Then comes the proviso which limits the exercise of their jurisdiction. It provides that, although the subject-matter be under 10*l.*, yet if there should be a purpose notified by the party who is brought before the justices, that he means to dispute the validity of the rate or his liability to pay it, the justices shall forbear. This is the point at which they are to hold their hand." Now, though, on the one hand, the jurisdiction is not taken away if the objection on

the face of it appears to be absurd and one which can produce no result; on the other hand, when that is not so, the magistrates must hold their hands. Although the jurisdiction is not stopped by an objection, for instance, that the rate was made on Friday, yet, on the other hand, when the objection is reasonable they are not entitled to say that they choose to disbelieve the bona fides. Nothing like that will be found to be in the spirit of any decision which has taken place.

*861] *ERLE, J.*—This question comes before us in respect to our jurisdiction under a writ of certiorari. If we choose to issue that, we are not confined to what appears on the document returned, but have very large powers to review the proceedings. Now, without coming to the much disputed point, whether a fact which is in doubt is one which affects the jurisdiction in the first instance or one upon which magistrates are to judge, I think this case is clear enough. The jurisdiction of the justices is, to decide whether the rate is made and demanded. But then there is a collateral point, on which the jurisdiction depends: that is, whether the validity of the rate is disputed. If it is, the justices are to hold their hands. That is collateral to the merits, and a matter on which the jurisdiction depends. And, as laid down in the judgment of *Bunbury v. Fuller*, 9 Exch. 140,† “it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends.” That passage, with a slight change of expression, exactly decides the point now before us.

CROMPTON, J.—I am entirely of the same opinion. Acting upon the jurisdiction which this Court has, to keep inferior courts within the limits of their jurisdiction, we ought to make the rule absolute. This is a case where, if a particular circumstance occurs, the jurisdiction of the justices is entirely gone: it is quite different from cases where the fact which gives jurisdiction is itself an ingredient in the judgment which is to *862] be given if there be jurisdiction, such cases as *Regina v. Dayman*, 7 E. & B. 672 (E. C. L. R. vol. 90), for instance, where the magistrate, if he had jurisdiction, would still have to decide whether the place in question was a new street. It is different also from the case on the County Court Act, *Thompson v. Ingham*, 14 Q. B. 710 (E. C. L. R. vol. 68), where the county court had to decide whether title came in question. I agree altogether with the judgment in *Bailey's Case*, 3 E. & B. 607 (E. C. L. R. vol. 77). If there was evidence on which the justices might conclude that the relation of master and servant existed, their decision upon that was final. Why? Because that made part of the case which was before them. But the matter here, if it happens, removes the case from the jurisdiction of the magistrates altogether. In all such cases the principle of *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41), applies. The judgment in *Bunbury v. Fuller*, 9 Exch. 140,† is also exactly applicable. On the question whether, there being jurisdiction, the order should be made, the decision of the magistrates is conclusive. But they cannot give themselves jurisdiction. The facts are quite clear upon the affidavits. Rule absolute.

*Ex parte LEE, LL.D. June 12.

[*863

This Court refused to grant a mandamus requiring the visitors named in the charter of the College of Doctors' Commons to inquire into the mode in which the College, under stat. 20 & 21 Vict. c. 77, ss. 116, 117, had exercised their discretion as to the surrender of their charter and the disposition of their property.

COLLIER moved for a rule to show cause why a mandamus should not issue, directing The Visitors of The College of Doctors of Law, Exercent in the Ecclesiastical and Admiralty Courts, to exercise their visitatorial authority. The following facts appeared on affidavit.

By charter of 22d June, 8 G. 3, the then Official Principal and Dean of the Court of Arches and Judge of the Prerogative Court of Canterbury, the then Judge of the High Court of Admiralty, the then Advocate General, and fourteen Doctors of Law of the Universities of Oxford or Cambridge, exercent in the Ecclesiastical and Admiralty Courts, and their successors, were incorporated by the name of The College of Doctors of Law, Exercent in the Ecclesiastical and Admiralty Courts; to consist of a president, namely, the Dean of the Arches for the time being, and of such Doctors of Law of either of the Universities of Oxford or Cambridge who should have been admitted advocates in pursuance of the rescript of the Archbishop of Canterbury, and elected fellows of the college in the manner after mentioned; and, among other grants, were enabled to raise any sum or sums of money, not exceeding 30,000*l.*, and empowered to purchase, hold, and enjoy, in perpetuity or otherwise, for them and their successors, any books, manuscripts, goods, chattels, or any other thing whatsoever; and also to purchase, take, hold, and enjoy, in *perpetuity or otherwise, any lands, tenements, [864 or hereditaments whatsoever, not exceeding the yearly value of 1000*l.* in the whole, to them and their successors, without incurring any of the penalties or forfeitures of the Statutes of Mortmain, or of any of them. And it was declared that it should be lawful for any body or bodies corporate, person or persons, to give, grant, bargain, demise, sell, or convey any lands, tenements, or hereditaments whatsoever, not exceeding the said value of 1000*l.* a year in the whole, to the said college, and for the use and benefit of the said college, and their successors, without license of alienation in mortmain; and that it should and might be lawful for them and their successors to alien or raise money on any part of their estates, at their pleasures. "And the said college shall govern themselves, and all their proceedings and business, according to the statutes, rules, orders, and by-laws to be made as hereinafter is mentioned." Rules followed for the admission of fellows; and there was given to the "president and fellows, and their successors, for ever, full power and authority, from time to time, to make, constitute, ordain, and establish, such and so many reasonable by-laws, rules, orders, ordinances, and constitutions, as they or the greater part of them, being there present, shall judge proper and necessary, for the regulation and management of the possessions and revenues of the said college; and the same, from time to time, as they may see occasion, to vary, alter, or revoke; and to make such new orders and regulations in their stead, as they shall, to the best of their judgments and discretions, think most proper and expedient, so as the same be just, honest, and reasonable, and no way repugnant or contrary to the laws of this Our realm. And

*865] Our *Royal will and pleasure is that a majority of the members of the college shall be present at any meeting when business is to be transacted, and that a majority of those present must concur in any act, which shall be binding upon the college." "Provided also, that, if any abuses or differences shall, at any time hereafter, arise and happen concerning the government or affairs of the said college, whereby the constitution, progress, improvement, and business thereof may suffer or be hindered, in such case we do hereby, for us, our heirs and successors, assign, constitute, authorize, and appoint the Most Reverend the Lord Archbishop of Canterbury, the Lord Chancellor or Lord Keeper of our Great Seal of Great Britain, the Lord Keeper of our Privy Seal, and our two principal Secretaries of State, for the time being, to be visitors of the said college, with full power and authority to them, or any three or more of them, from time to time, to compose and redress any such differences or abuses."

Before and at the time of the passing of stat. 20 & 21 Vict. c. 77, "To amend the law relating to probates and letters of administration in England," John Lee, LL.D., was, and thence hitherto had been, and still was, a fellow of the college. On 23d April, 1858, he sent to each of the visitors a memorial, signed by himself. The memorial set out extracts from the charter, and a list of the president and fellows of the college. It stated that, under the charter, the college was now seised and possessed of divers lands, tenements and hereditaments, and personal estate and effects. It then referred to stat. 20 & 21 Vict. c. 77, and especially to sects. 116 and 117.

*866] *Sect. 116 authorizes the college "from time to time hereafter to let, sell, or exchange for other real or personal estate, or both, all or any part of the real and personal estate which shall for the time being belong to the said college, either directly or through the medium of any trustee or trustees, and to lay out the moneys to be received on any such sale or exchange, or otherwise, belonging to the said college as aforesaid, in the purchase of other real or personal estate, or both, but so that the said college shall not at any one time hold or enjoy real estate of a yearly value exceeding 1000*l.* in the whole, and to pay, apply, and dispose of the income of all the real and personal estate which shall for the time being belong to the said college as aforesaid to or for the benefit of such body or bodies politic or corporate, or person or persons, whether being or including, or not being or including, the said college, and all or any individual members or member thereof for the time being, and generally for such purposes and in such manner as the said college shall think fit; and further, to alien and dispose of all or any part of such real and personal estate, and the proceeds of any sale thereof, either by way of donation, voluntary disposition, or otherwise, unto, between, or amongst any body or bodies politic or corporate, or any person or persons whatsoever, whether being or not being a member or members of the said college: Provided always, that no donation or other voluntary disposition of the corpus, or any part of the corpus, of the real and personal estate of the said college to any person or persons being a member or members thereof at the time of such donation or

*867] other voluntary disposition shall be effectual without *the previous consent thereto of a majority of the members of the said college present at any meeting of the college, and the receipt of the treasurer

for the time being of the said college shall be an effectual discharge for all gross annual and other sums which shall for the time being belong or be payable to the said college."

Sect. 117 enacts that "it shall be lawful for the said college, at any time after a resolution to that effect shall have been come to at a meeting of the college, by a majority of the members present at such meeting, to surrender and yield up to Her Majesty, Her heirs or successors, at such time as in such resolution shall be determined, the charter of incorporation of the said college, and all franchises and privileges thereby conferred, or which shall for the time being belong to the said college; and upon and by such surrender the said corporation shall be dissolved, and shall cease to exist, for all purposes whatsoever (except so far as its existence may be requisite for the saving of the rights of Her Majesty, Her heirs and successors, and of all and every person and persons, body and bodies politic or corporate, whatsoever other than the said college), and all real and personal estate which at the time of such dissolution of the said college shall belong to the said college for its own use and benefit, either directly or through the medium of any trustee or trustees, shall thenceforth belong, for all the estate and interest therein which at the time of such dissolution belonged to the said college absolutely, to all the persons who at the time of such dissolution thereof shall be the president and fellows of the said college, in equal shares as tenants in common, to and for their own use and benefit *respec- [368
tively, but subject to any charges or encumbrances affecting the
same at the time of such dissolution, and all real and personal estate of
which the said college at the time of such dissolution thereof be seised
or possessed, upon any trust or trusts, shall thereupon become vested in
the four persons who at the time of such dissolution shall be the presi-
dent and three senior fellows of the said college, as joint tenants, their
heirs, executors, or administrators, according to the nature of the real
and personal estates respectively, upon the trust or trusts affecting the
same respectively."

This Act came into operation on 11th January, 1858. On 13th January, 1858, a notice was sent to each of the fellows of the said college intimating that, on a meeting to be held on 15th January then instant, a motion would be made for surrender of the said charter, and the disposition by sale or otherwise of the college property for the common benefit of the then members; and that, until steps could be taken for carrying out the above objects, the real property of the society should be vested in trustees, according to the terms of the Probate and Administration Act, 20 & 21 Vict. c. 77, s. 116, for the use and benefit of the present members of the Society: and that a portion of the fund (18,000*l.* consols) then standing in the name of the college in the books of the Bank of England should be at once appropriated to each member of the college, reserving a sufficient sum for the purpose of defraying the necessary expenditure of the society till it should cease to exist.

Dr. Lee wrote a letter of remonstrance to the Treasurer of the college. The meeting was held on 15th January, 1858. Nineteen fellows were present. The *motion referred to in the foregoing notice was [369
put, but afterwards withdrawn; and a resolution was carried, by
a majority of the fellows then present, that the property of the society
should, as soon as might be, vest in the then present members of the

society, and that, with such view, a committee should be appointed in order to carry into effect such the resolution of the society, and to take an opinion, if necessary, of counsel. And certain of the fellows were thereupon appointed as a committee for carrying out such resolution.

A meeting was held on 27th January, 1858, when the following resolution (by way of amendment on a previous motion) was passed. "Resolved, with the consent of a majority of the members of the college present at this meeting, that the sum of 600*l.* consolidated three per cent. annuities, parcel of the sum of 18,000*l.* like annuities standing in the books of The Governor and Company of the Bank of England, in the name of, and belonging to, 'the College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts,' be transferred, by way of donation and voluntary disposition, to or according to the direction, and on the account, and for the absolute use, of every of the present members of this college: provided that any and every of the present members of this college who, for the space of three calendar months after a copy of this resolution signed by the treasurer of this college shall have been delivered to or sent through the post addressed to him at his chambers in Doctors Commons, or his usual place of abode, shall neglect or refuse to signify in writing to the treasurer of this college his acceptance of such sum of 600*l.* consolidated three per cent. annuities, shall *870] not be entitled to have the same *transferred to or according to his direction, and on his account; but the same shall continue the property of this college, and shall be dealt with and disposed of in all respects as such, as if this present resolution had not been made; but no such neglect or refusal shall in any manner affect this resolution as to any sum of 600*l.* consolidated three per cent. annuities, other than that to which such neglect or refusal may relate." Amendments were proposed, with a view of delaying the carrying out of this resolution, but were negatived. Two doctors then gave notice of appeal to the visitors.

On 4th February, 1858, a meeting of the college was held, when a resolution was passed for vesting the property of the college, exclusive of funded property and cash, in five fellows, as trustees for effecting the disposition of the property.

The memorial then stated that differences existed among the members of the college, touching the propriety of surrendering the charter, and concerning the affairs of the college. And Dr. Lee stated his own conviction that the surrender of the charter and the appropriation of the property would constitute a breach of trust, and would not be justified by the Act of Parliament: and he added, at considerable length, arguments in favour of his views; and he concluded as follows.

"Your memorialist therefore prays that the said visitors, under the powers bestowed upon them by the said charter, may institute an inquiry into the differences and abuses hereinbefore mentioned concerning the government and affairs of the said college, and into the premises generally, and that they will be pleased to make such order restraining the *871] sale or alienation of the *estate or property, real or personal, of the said college, or any portion thereof, and institute such inquiry into the said several dealings of the said president and fellows with the said estate and property, and that they will grant such other, and fur-

ther relief, or make such other order in the premises, as to them shall seem meet."

The affidavits then stated facts for the purpose of showing a virtual refusal on the part of the several visitors.

Collier now contended that the visitors had a general power of controlling the acts of the corporation, and of inquiring whether the discretion vested in the corporation had been properly exercised.

Per CURIAM.(a)—It does not appear that the power of disposing of the property is in the visitors. This is only a dispute among the members of the corporation as to the way in which they shall exercise their powers.

Rule refused.

(a) Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

END OF TRINITY TERM.

*MEMORANDUM.

[*872

At the close of this Term, Sir John Taylor Coleridge, Knight, resigned the office of Judge of this Court. He had previously been sworn in a member of Her Majesty's Privy Council. In the Vacation,

Hugh Hill, Esq., one of Her Majesty's Counsel, was appointed a Judge of this Court, having previously been called to the degree of the coif, when he gave rings with the motto, *Nil nisi cruce*. He afterwards received the honour of knighthood.

CASES

ARGUED AND DETERMINED

IN

Trinity Vacation,

XXI. & XXII. VICTORIA. 1858.(a)

The Judges of the Court of Queen's Bench who generally sat in Banc in this Vacation, were :

WIGHTMAN, J.
ERLE, J.

CROMPTON, J.
HILL, J.

HAIGH v. The Guardians of NORTH BIERLEY Union. *June 14.*

The guardians of a poor law Union, suspecting fraud by their clerk in the Union accounts, employed plaintiff to investigate them, and, during the progress of such investigation, and after the appointment of a new clerk, also employed plaintiff to make up the Union accounts for the last half year, which involved a fresh investigation by him into the old accounts. Plaintiff was employed under three several resolutions of the Board of Guardians, entered in their minute book; but no contract was made under the seal of the board. In an action by plaintiff against the board for work and labour,

Held, by Erle, J. (dubitante Crompton, J.), that, as the work done by plaintiff was incidental and necessary to the purposes for which the Board of Guardians were created, and had been performed by plaintiff at the request of the board, he was entitled to recover, though the contract was not under seal.

DECLARATION for money payable by defendants to plaintiff for work done and materials provided, *and journeys taken and expenses
*874] incurred, by plaintiff for defendants, at their request; for money paid; and for moneys due on accounts stated.

Pleas. 1. Except as to 150*l.*: Never indebted. 2. Payment into Court of 150*l.*

The plaintiff took issue upon the first plea: and, as to the second, accepted the money paid into Court.

On the trial, before Martin, B., at the last Spring Assizes for Yorkshire, it appeared that the plaintiff claimed 277*l.* 13*s.* 7*d.* for his services to the defendants as accountant, under the following circumstances. In January, 1857, the Board of Guardians, having reason to believe that their clerk had been guilty of irregularity and defalcation in keeping the Union accounts, engaged the plaintiff to investigate the books, under the following order.

(a) The Court of Queen's Bench sat in Banc on the 14th, 15th, 16th, 17th, 25th, and 26th of June; and, for the delivery of judgments only, on 3d July.

"Resolved" "that Mr. Thomas Haigh, of Bradford, be appointed to audit the accounts of the Union."

"Resolved" "that Mr. Haigh be furnished with any books required by him for the investigation of the accounts."

On 5th February, 1857, the board passed a resolution to appoint a new clerk; and the books of the Union were placed in the plaintiff's hands for investigation. The plaintiff, having explained his plan of investigation to the board, which was approved of by them, proceeded with the investigation, which resulted in the discovery of considerable frauds by the late clerk, extending over eight years. The new clerk was appointed on 19th February, 1857. While the investigation was proceeding, the board, on 26th March, 1857, passed the following resolution.

"Ordered that Mr. Haigh, accountant, be authorized *and [875 required to make up the books and prepare the whole of the accounts of the Union for the next audit, he having all the books before him."

On 21st May, 1857, the board passed the following resolution.

"Mr. Haigh having reported to the Board that considerable discrepancies existed between the non-settled and general ledgers from the commencement of the Union to the end of the September half year last past: Resolved that Mr. Haigh investigate the accounts, and ascertain the bearing which the discrepancies have on the accounts of the several townships in the Union, and report thereon to the Board on Thursday next."

On 11th June, 1857, the board passed the following resolution.

"Resolved, that Mr. Haigh be informed that the board wish him to conclude the making up of the accounts with the least possible delay, that the clerk may have the books at the offices of the board."

On 20th August, 1857, the following minute was entered upon the books.

"The clerk was directed to apply to Mr. Haigh, and desire him to send in his bill for making up the accounts of the late clerk."

The plaintiff accordingly sent in his bill for 277*l.* 13*s.* 7*d.*, of which 111*l.* 6*s.* was for the investigation of the accounts of the late clerk, the remainder for preparing the accounts of the Union for the next audit; which preparation, however, according to the particulars of the bill, involved a fresh investigation into the accounts of the late clerk, for the purpose of correcting the standing balances. It was objected, on behalf of the defendants, that they were not liable, inasmuch as they had not contracted under seal for the plaintiff's services, *and that those [876 services were not incidental to, and necessary for carrying on, the business of the corporation; and, further, that, as the plaintiff's services were such as ought, by law, to have been performed by the regular clerk to the guardians, the board had acted ultra vires in employing the plaintiff for that purpose. It was also objected that the charges were unreasonable in amount. The learned Judge overruled the objections in law, and left it to the jury to say, first, whether the work had been done in pursuance of the resolutions, and, if so, whether the amount claimed was a proper one. The jury found for the plaintiff on both points, and returned a verdict for the whole amount claimed.

Hugh Hill, in last Easter Term, obtained a rule to show cause why

the verdict and judgment should not be set aside, and a new trial had, "on the ground that the evidence showed that the employment of the plaintiff was not by a contract under the seal of the defendants, and that the object of the employment was not essentially necessary for carrying the purposes of the corporation into execution, and that the whole, if not, a material part, of the work for which the plaintiff seeks to recover was work which the defendants were bound, by law, to employ their clerk to perform, and that the defendants could not, by law, employ the plaintiff as an accountant to do the work."

Manisty and Cleasby now showed cause.—First, the engagement of the plaintiff by the defendants is not a contract at all. It was an employment of him from hour to hour, and amounts, at the most, to an implied contract only. [ERLE, J.—It is rather a tacit contract. CROMPTON, J.—It is not the less a direct contract because it arises from *877] hour to hour. Still, it seems unreasonable *that an order under seal should be necessary for each stage of the plaintiff's services.] That is what the plaintiff contends. Such a rule could never be carried out. [ERLE, J.—Is there any provision in stat. 5 & 6 W. 4, c. 69, empowering the Board, though created a corporation by the Act (sect. 7), to contract without seal?] There is no express enactment to that effect. But all that sect. 7 enacts is, that the board "may" use a common seal. Sect. 4 & 5 W. 4, c. 76, s. 38, provides that "no act of" any meeting of the board "shall be valid unless three members shall be present and concur therein;" but makes no mention of the seal of the board as an element of validity. Further, the services of the plaintiff were incidental and ancillary to the carrying on by the Guardians of the ordinary business of the Union, and need not, therefore, be contracted for by seal. *Arnold v. The Mayor of Poole*, 4 M. & G. 860 (E. C. L. R. vol. 43), and *Mayor of Ludlow v. Charlton*, 6 M. & W. 815,† may be relied on by the other side. But in those cases the subject-matter of the contract was not one which arose out of the ordinary course of business of the corporation. *Clarke v. The Cuckfield Union*, 1 Low. & M. 81,(a) is a strong authority for the plaintiff. In that case, which has never been overruled, all the cases bearing upon the point were discussed and considered; and the decisions in *Sanders v. St. Neot's Union*, 8 Q. B. 810 (E. C. L. R. vol. 55), and *Beverley v. The Lincoln Gas Light and Coke Company*, 6 A. & E. 829 (E. C. L. R. vol. 33), which are also authorities in favour of the plaintiff, were upheld by the Court. [CROMPTON, J.—*Paine v. Strand Union*, 8 Q. B. 326, is against you.] There the contract was held not to be necessarily incident to the purposes of the corporation. *878] **Henderson v. Australian Royal Mail Steam Navigation Company*, 5 E. & B. 409 (E. C. L. R. vol. 85), is also an authority for the plaintiff. Here, moreover, the contract has been executed; and therefore the defendants cannot avail themselves of this technical objection: *Lowe v. North-Western Railway Company*, 18 Q. B. 632 (E. C. L. R. vol. 83). *Diggle v. London and Blackwall Railway Company*, 5 Exch. 442,† may be relied on for the defendants: but Erle, J., in giving judgment in *Henderson v. Australian Royal Mail Steam Navigation Company*, 5 E. & B. 409 (E. C. L. R. vol. 85), said that, unless *Diggle v. London and Blackwall Railway Company*, 5 Exch. 442,† could be distinguished on the ground that the contract there did not arise out of the

(a) In the Bail Court, before Wightman, J.

ordinary course of business of the company, the case was in conflict with the other authorities, and he could not adhere to it. One of the latest cases, and one which is strongly in favour of the plaintiff, is *Australian Royal Mail Steam Navigation Company v. Marzetti*, 11 Exch. 228.† [CROMPTON, J.—There the action was by the corporation, upon a promise by the defendant: and therefore there was no necessity for their seal, any more than if a bond had been given to them.] In Kent's Commentaries, vol. II. part IV. Lect. 33 (6), it is said that "it was decided by the Supreme Court of the United States, in the case of *The Bank of Columbia v. Patterson*, 7 Cranch 299, that whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol contracts made by its authorized agents were *express* and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised *implied* promises, for the enforcement of which an action lay."

*Secondly, it is objected that the plaintiff's services were such as fell within the ordinary duties of the clerk to the Board of Guardians. That objection, even if good, would apply only to part of such services, namely, the making up of the accounts for the half year. But even that duty, under the particular circumstances, amounted to much more than the ordinary making up of the books by the clerk, inasmuch as it involved a fresh investigation of the accounts of the former clerk. And, as to the first investigation of those accounts, that was clearly not within the ordinary duties of the clerk to the guardians. It would have been utterly impossible for the clerk, without neglecting his other duties, to perform it without assistance.

Overend and Kemplay, contra.—First, the plaintiff's services were such as ought to have been discharged by the clerk to the guardians; and the guardians acted ultra vires in engaging the plaintiff to perform them. The making up of the accounts for the half year was clearly within the functions of the clerk; and the new clerk had been appointed some time before the order was given to the plaintiff. And, as to the first investigation into the accounts of the former clerk, it cannot be reasonably contended that it falls within the term "extraordinary services," for which, by arts. 153,(a) 172,(b) of the Consolidated General Order of the Poor Law Commissioners, 24th July, 1847, the guardians are empowered to employ and pay an assistant. The duties of the clerk to the guardians are set out in art. 202(c) of *the same general order, and clearly embrace such an investigation as this. And, [*880 even if they do not, the guardians ought to have called a committee "to consider and report" on the subject.(d) [CROMPTON, J.—The plaintiff's services must be considered as preliminary to that.] Secondly, even if the guardians had power to make such a contract as this, they were bound to make it under seal. In *Church v. The Imperial Gas Light and Coke Company*, 6 A. & E. 846 (E. C. L. R. vol. 33), it was held that there was no distinction between executed and executory parol contracts by a company, as to their rights and liabilities to sue and be sued upon them. And neither that case nor *Beverley v. The Lincoln Gas Light and Coke Company*, 6 A. & E. 829 (E. C. L. R. vol. 33), are

(a) Glen's Consolidated and other Orders, &c., p. 95 (4th ed.).

(b) Glen, p. 110.

(c) Glen, p. 124.

(d) Art. 40. Glen, p. 20.

authorities for the plaintiff. In the first, the defendants were a company established for trading purposes of a peculiar character, and the contract was directly incidental to such purposes: in the second, the decision was mainly founded upon the supposed analogy of the authorities upholding actions by corporations aggregate for use and occupation, and upon the peculiar nature of that action. *Lowe v. North Western Railway Company*, 18 Q. B. 632 (E. C. L. R. vol. 83), which was cited as an authority to the contrary, was decided chiefly on the ground that the defendants had, under *The Companies Clauses Consolidation Act*, 1845, 8 & 9 Vict. c. 16, s. 97, express authority to contract, in a particular mode, by parol. In *Homersham v. Wolverhampton Waterworks Company*, 6 Exch. 137,† where there was no evidence of the parol contract having been made by the company in the manner permitted by that Act, and in *Finlay v. Bristol and Exeter Railway Company*, 7 *881] Exch. 409,† where there was no *evidence of the parol contract having been made by the company in the manner permitted by their private Act, the Court held that there was no legal contract. In the latter case, and in *Smart v. Guardians of the West Ham Union*, 10 Exch. 867,† which is also an authority in favour of the defendants, Parke, B., referred to *Sanders v. St. Neot's Union*, 8 Q. B. 810 (E. C. L. R. vol. 55), and stated that he did not, at the trial, overrule the objection that the contract was not under seal. *Diggle v. London and Blackwall Railway Company*, 5 Exch. 442,† is an authority for the defendants; and so, to some extent, is *London Dock Company v. Sinnott*, 8 E. & B. 347 (E. C. L. R. vol. 92). (They also referred to *Cope v. Thames Haven Dock and Railway Company*, 3 Exch. 841;† *Ernest v. Nicholls*, 6 H. L. Ca. 401; *Arnold v. The Mayor of Poole*, 4 M. & G. 860 (E. C. L. R. vol. 43); *Regina v. Mayor of Stamford*, 6 Q. B. 433 (E. C. L. R. vol. 51); *Freud v. Dennett*, 4 Com. B. N. S. 576 (E. C. L. R. vol. 98); and *Lamprell v. Billericay Union*, 3 Exch. 283.†)

ERLE, J.(a)—I am of opinion that this rule should be discharged. The question is one rather of fact than of law. *Sanders v. St. Neot's Union*, 8 Q. B. 810 (E. C. L. R. vol. 55), and *Clarke v. The Guardians of the Cuckfield Union*, 1 Low. & M. 81, seem to me to have decided that an action lies against the guardians of an Union to recover money for work and labour, though performed under a contract not under seal; and the grounds for that decision are elaborately stated by my brother Wightman in the latter of these two cases. He there says: "Wherever *882] the purposes for which a *corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect—as in the case of the guardians of a poor law Union,—and orders are given, at a board regularly constituted and having general authority to make contracts, for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods are supplied and accepted by the corporation, and the whole consideration for payment is executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing a seal is wanting, and therefore that no action lies, as they were not competent to make a parol contract, and may avail

(a) Wightman and Hill, Js., were absent.

themselves of their own disability." In the present case the work and labour had been performed, and was performed at the request of the guardians; and was, in my opinion, incidental to the purposes for which the guardians were created. They had appointed a proper officer to manage the Union accounts: they had reason to suspect that he had been guilty of fraud and embezzlement: and, by their first resolution, they appointed the plaintiff as an accountant to give them information upon this point. Such an appointment was clearly for a purpose within the general scope of their functions as guardians, namely, that of protecting the funds of the Union. All the subsequent employment of the plaintiff by the defendants was of a similar description, the investigation turning out more extensive than was at first believed; and the plaintiff's whole time was taken up in this employment. *No valid distinction can be drawn, for the purposes of this case, between the [*883 nature of the services rendered by the plaintiff and those sued upon in the two cases which I have cited. In *London Dock Company v. Sinnott*, 8 E. & B. 347 (E. C. L. R. vol. 92), the Court thought that the contract not only admitted of its being under seal, but could be more conveniently made under seal than by parol. I am not aware that that point was ever taken before; but, whatever its weight, it does not arise here: the facts are quite different.

CROMPTON, J.—I am of the same opinion. I do not think the provisions of the Consolidated Order of the Poor Law Commissioners have any bearing upon the case. The question is, was this contract one to which the guardians easily could, and were bound to, affix a seal? I feel a difficulty in distinguishing this case from *London Dock Company v. Sinnott*. If the contract were, as has been contended, a contract from hour to hour, it might be impossible for the guardians to affix a seal. But if, on the other hand, the work was distinct and specified work, done under three several resolutions, I should doubt very much whether the contract should not have been under seal. Upon the whole, the evidence seems to me in favour of the plaintiff: but I feel sufficient doubt upon it to induce us to reserve leave to the defendants to appeal.

Rule discharged.

*IN THE EXCHEQUER CHAMBER.

[*884

HODSOLL *v.* BAXTER. *June 14.*

In an action on a judgment, the plaintiff may endorse the particulars on the writ of summons, under sect. 25 of The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and on non-appearance, sign judgment under sect. 27.

THE record in the Court of Queen's Bench was as follows.

"In the Queen's Bench.

"The 13th day of May," 1857.

"England to wit. William Hodsoll, by Thomas Willis his attorney, sued Charles Willding Baxter, by virtue of a writ issued out of this Court endorsed according to the Common Law Procedure Act, 1852, as follows.

"The following are the particulars of the plaintiff's claim.

"The plaintiff claims of the defendant the sum of 24*l.* 11*s.* 1*d.*, being the amount of debt and costs recovered by the plaintiff against the defendant under and by virtue of a judgment recovered in Her Majesty's Court of Queen's Bench on the 13th of April, 1857, and which said sum of 24*l.* 11*s.* 1*d.* still remains wholly due and unpaid.

"And the said Charles Willding Baxter has not appeared. Therefore it is considered that the said William Hodsoll do recover against the said Charles Willding Baxter the sum of 24*l.* 11*s.* 1*d.*, together with 5*l.* 17*s.* for costs of suit."

The defendant alleged error, which the plaintiff denied.

*885] *T. Bell*, for the party alleging error (defendant below).—*The plaintiff has signed final judgment, on the assumption that sect. 27 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), applies to the case of debt on judgment. That depends upon the question whether the endorsement can be made on the writ of summons under sect. 25. Now that section authorizes the proceeding where "the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, or check, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, check, or note." The action on a judgment is not included. [WILLES, J.—Is it not a claim "in the nature of a debt?" WATSON, B.—Debt on judgment is the highest of all debts.] Sect. 25 does not apply to claims of so high a nature. The costs which make part of the debt in judgment have nothing to do with "contract." None of the precedents of special endorsement given in No. 4 of Schedule (A) are applicable to debt on judgment. If the Court considers that the proceeding is correct, it is of course unnecessary to consider whether, if it were incorrect, error would lie.

Watkin Williams, contra, was not called upon.

WILLIAMS, J.—I think the judgment must be affirmed. The claim is within the spirit of the enactment: it is out of the question to suppose that the Legislature intended to omit such a case as this. If, then, *886] the language of sect. 25 can be construed so as to include the case, it ought to be so construed. Now it seems to me that the case is within the two parts of the section. If you take the word "debt," where it first occurs, by itself, and afterwards apply the words "liquidated demand" to "contract" and what immediately follows, the word "debt" will include the case. And, again, looking at the later words, I cannot see that the section does not include all cases where the claim is "in the nature of a debt."

MARTIN, B., concurred.

WILLES, J., concurred.

BRAMWELL, B.—I am of the same opinion. I think the word "debt" comprehends the case: at any rate this is a "liquidated demand."

WATSON, B.—It is clear that the intention of the Legislature was to comprehend all cases except claims for unliquidated damages.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

JOHN JACKSON, Administrator, &c., of OLIVER JACKSON, deceased, Appellant, *v.* RALPH WOOLLEY and HANNAH his Wife, Respondents. *June 14.*

This case, decided on appeal in the Court of Exchequer Chamber, is reported, 8 E. & B. 784 (E. C. L. R. vol. 92).

***JOSEPH REMFRY *v.* HENRY BUTLER and CHARLES [*887
WALTON. [*Jan. 26, 1858.*]**

Defendant being possessed of shares in a joint stock banking company, instructed his broker to sell them. Plaintiff instructed his broker to purchase shares in the said company. The two brokers agreed with each other to sell and buy respectively. Both brokers were members of the Stock Exchange; and, according to the custom of the Stock Exchange, the names of the principals are not mentioned at the time of such contract, but are communicated on the day preceding the day on which the sale is made; and, on the day last mentioned, the parties execute the contract. By the rules of the company, transfers could not be made without the consent of the directors; and seven days' notice of transfer must be given to them: but in practice, the rules of the company in this respect were not strictly enforced. In this case, no notice was given. On the day for which the sale was made, defendant's broker obtained a blank form of transfer from the company, which defendant executed three days afterwards. On the following day defendant's broker delivered the transfer to the plaintiff's broker. On that day the company had stopped payment: and plaintiff's broker refused to accept the transfer, or to pay the purchase-money. The company never consented to the transfer, nor resumed business, and ultimately became bankrupt.

Plaintiff desired his broker not to pay for the shares; but the broker, in obedience to the decision of the Committee of the Stock Exchange, before whom the question had been brought, paid the purchase-money to defendant's broker, who paid it over to defendant. Afterwards plaintiff paid the sum to his own broker, who had threatened to enforce payment by proceedings at law.

Plaintiff having sued defendant for money had and received, on the ground of failure of consideration: Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the action did not lie.

DECLARATION for money received by defendants to the use of plaintiff, and on accounts stated.

Plea: Never indebted. Issue thereon.

On the trial, before Wightman, J., at the London Sittings in Easter Term, 1857, a verdict was taken by consent for the plaintiff, subject to a case in substance as follows.

The plaintiff is a gentleman, residing, &c., and the defendants are the executors of Charles Walton, deceased, late of, &c., Charles Walton, deceased, died on 16th April, 1856, possessed of ten shares, numbered, &c., in the business of a joint stock banking company called The Royal British Bank. In August, 1856, the defendants, as such executors, instructed Messrs. Hichens & Harrison, stock and share brokers, and *members of the Stock Exchange, to sell the said ten shares on [*888 their account.

In the same August, 1856, the plaintiff instructed Messrs. Vigne & Sons, stock and share brokers, and members of the Stock Exchange, to purchase for him ten shares in the business of the said company.

On 21st August, 1856, Messrs. Vigne & Sons agreed, upon these instructions, with Messrs. Hichens & Harrison for the purchase of the said ten shares, at the sum of 353*l.*, from the 29th day of August, 1856, which was the settling day on the Stock Exchange for such transactions. According to the usage and practice of the Stock Exchange, all dealings take place between the brokers, members thereof, as though they were principals. No written contract is entered into, nor any bought or sold notes delivered; but each broker makes a memorandum of the transaction in his own book. The names of the principals do not appear, and are not mentioned at the time of the contract. Shares are sold for a particular day called the settling day; and, on the day immediately preceding it (which is called "name day"), the purchaser's broker delivers to the broker of the seller the name of the party on whose behalf the shares are purchased and to whom they are to be transferred. On the 28th August (the name day in this instance), Messrs. Vigne & Sons delivered to Messrs. Hichens & Harrison a ticket or memorandum, that the ten shares above mentioned were to be transferred to the plaintiff. The ticket also mentioned the price at which the shares were sold.

On 29th August, Messrs. Hichens & Harrison sent their clerk, William Theodore Ansell, to the bank, with the said ticket or memorandum, *889] and with instructions *to request that a transfer of the shares should be prepared. The transfer clerk at the bank, in answer to Ansell's application to that effect, stated that Messrs. Hichens & Harrison could prepare the transfer themselves; and he gave to Ansell some printed forms of transfer to fill up. Messrs. Hichens & Harrison, accordingly, on the same day, prepared a deed of transfer of the ten shares to the plaintiff by filling up one of such forms, which was executed by the defendant Butler on the 30th August, and by the defendant Walton on the 2d September.

About half past 11 of the morning of the 3d September, Hichens & Harrison delivered the transfer (unstamped) and the certificate of shares to Vigne & Sons. The Royal British Bank had stopped payment on the morning of the same day; and Messrs. Vigne & Sons refused to accept the transfer or pay the purchase-money. (A copy of the deed of transfer accompanied the case.) In consequence of this refusal, Messrs. Vigne & Sons were summoned by Hichens & Harrison on the following day, 4th September, to appear before the Committee of the Stock Exchange for the purpose of their liability to pay the amount being decided. On 3d September, the plaintiff, having become acquainted with the fact of the stoppage of the said bank, wrote the following letter to Messrs. Vigne & Sons.

"3d September, 1856.

"Pray don't pay, even if the committee say you ought, till you see me, and get my express permission, as I believe they cannot be now transferred to me."

On 4th September, 1856, Messrs. Vigne & Sons and Messrs. Hichens *890] & Harrison attended the said *Committee of the said Stock Exchange, which decided that Messrs. Vigne & Sons were to pay to Messrs. Hichens & Harrison the said purchase-money, and a further sum of 2*l.* for the stamp of the deed of transfer, which, on the same day, had been obtained from Messrs. Vigne & Sons by Hichens & Harrison, and had been stamped by the latter. This decision was duly confirmed.

Messrs. Vigne & Sons, as members of the Stock Exchange, were bound, by a rule of the Stock Exchange, to act on the decision of the committee. This rule was in the following terms. "In all cases brought under the consideration of the committee, their decision, when confirmed, is final, and shall be carried out forthwith by every member concerned therein."

Messrs. Vigne & Sons accordingly, notwithstanding the instructions of the plaintiff, paid the money, amounting to 357*l.*, to Messrs. Hichens & Harrison, who have since paid it to the defendants.

Subsequently, and before the commencement of this action, the plaintiff, being advised that Messrs. Vigne & Sons could recover at law against him the sum so paid, and upon being threatened by them with legal proceedings to recover the amount, reimbursed Messrs. Vigne & Sons.

The Royal British Bank was, at the time mentioned, incorporated by Royal Charter, dated the 17th day of September, 1849, which contained the following clauses.

7. That the name, residence, degree, profession, or trade of every proprietor and the number of his shares should be entered in a book to be provided for that purpose, and called the "Shareholders' Register," which should be kept at the head banking-house aforesaid; and that the company should, from time to time, cause *to be printed, and [*891 kept in a conspicuous place accessible to the public in the said head banking-house, a list of the registered names and places of abode of all the members of the company for the time being.

10. That it should be lawful for every proprietor, and every person claiming in his or her right in any way howsoever, with consent of the Court of Directors, to sell and transfer by deed, duly stamped, in which the consideration should be truly stated, the shares to which he or they should be entitled, or any of them, to any person or persons, subject nevertheless to the conditions or restrictions therein contained; and that the same, when duly executed, should be delivered to the secretary or other proper officer of the company, and to be kept by him; and that he should enter a memorial thereof in a book, to be kept at the head banking-house aforesaid, and to be called the "Register of Transfers," and should endorse such entry on the deed of transfer; and that for every such entry and endorsement the company should be entitled to 2*s.* 6*d.*; and that such deed so endorsed should be sufficient evidence of the consent of the Court of Directors.

11. That the person or persons proposing to make any transfer of shares, or the person or persons to whom the same was proposed to be made, should, seven days at the least before the making or executing any such transfer, deliver to the Court of Directors, at the head banking-house aforesaid, a notice in writing specifying the number of shares proposed to be transferred, and the name or names, residence or rank, profession or trade (and if representatives their character or title as such), as well of the person or persons so proposing to transfer, as of the person or persons to whom such *transfer was proposed to be made, and the price or consideration (if any) proposed to be [*892 given for the same.

12. Provision for the case of a proprietor changing his residence, name, &c.

13. That the Court of Directors should prescribe the form of the E., B. & E.—81

transfer of the shares ; and that every purchaser or transferee of shares should, in respect of the shares purchased by or transferred to him, and at his own expense, when required by the said Court, execute this or any supplementary deed or deeds, and enter into such covenant with the company to observe, fulfil, and perform all the clauses, conditions, and stipulations therein contained, as by the said Court should be required.

14. That, if any person who should acquire any share by transfer, and who should not have executed this or some supplementary deed, should refuse or neglect to execute the same or any supplementary deed, for three months after notice in writing requiring him so to do should have been sent to him as thereafter provided, it should be lawful for the Court of Directors to declare his shares, and all benefit and advantage thereof, to be forfeited for the benefit of the other members of the company ; and that the same should thereupon be forfeited accordingly, subject to the power of remission thereafter contained.

16. That, upon every sale or transfer of shares or change of proprietorship therein, the then existing certificate should be given up to be cancelled, and should forthwith be cancelled accordingly, and that a new certificate should be given to the new proprietor in respect of the shares transferred to or taken by him ; and that, if any of the shares included *893] in the certificates so given up should be retained by the old proprietor, a new certificate in respect thereof should be issued to him, without any other fee than that paid on the transfer ; and that the production of any certificate should at all times be good *prima facie* evidence of the title of the person holding the same as proprietor of the shares therein mentioned.

17. That, whenever any shares should become forfeited or duly and effectually transferred to or vested in a new proprietor qualified to hold the same, the former proprietor should, except as thereafter provided, be freed and released from all future responsibility and obligations to the company in respect of such shares, and exonerated and discharged from all subsequent claims and demands of the company in such respect, and from all future observance and performance of the covenants, conditions, stipulations, and agreements in the now being recited or in any supplementary deed contained ; and that the person to whom any transfer should be made should take the shares subject to the obligations of the person transferring the same.

18. That all the general affairs, business, and concerns of the company should be under management, superintendence, and control of the Court of Directors as thereafter constituted ; and that they should have the entire, sole, and exclusive control, management, and disposal of the stocks, funds, estates, property, and revenues of the company, and should regulate and determine the mode and terms of carrying on the business thereof. (Provision for appointing a general manager.)

49. (Provision for payment of calls by proprietors, to enable them to *894] sell shares, vote, &c.) Nor should any *proprietor be entitled to vote at any meeting of proprietors in respect of any shares of which he should not have been the registered proprietor for the space of six months at the least before such meeting.

Since the morning of the 3d September the said Royal British Bank never resumed business, but have become bankrupt.

The defendant, Charles Walton, is the son of the said Charles Walton deceased, and was, at the time of the transfer, himself a shareholder in the said bank. Neither the defendants nor the plaintiff, nor either of their respective brokers, delivered to the Court of Directors any written notice as required by the 11th clause of the said charter; nor was any consent of the said Court of Directors, otherwise than as appears herein, obtained for the sale or transfer of the said shares. For some time before the sale of the said shares, and up to the stoppage of the bank, it had not been the practice of the Court of Directors, in cases of sales of shares in the said company upon the Stock Exchange, to require a seven days' notice to be left with or given to them under the 11th section. In some instances no notice, and in most less than seven days' notice, was given without objection on the part of the directors. The course of business of the Court of Directors was to allow their transfer clerk to deliver out printed forms of transfer to stock brokers making application for a transfer of shares for the purpose of the same being filled up and executed, and for such brokers to fill up these forms, and to procure their execution by the vendors. The transfers were then delivered to the brokers of the purchasers, who caused the purchasers to execute them; and the deeds were then delivered by the purchasers' broker to *the transfer clerk; and they were then generally laid [*895 before the Board of Directors by the secretary. Occasionally, however, the transfer clerk registered the deeds in the books of the company, without submitting them to the directors. In most cases, the deeds were then registered as a matter of course; and, in some instances, the attention of the directors being called to transfers which appeared to be objectionable, the directors postponed the perfecting the proposed transfer by registration until the circumstances of the case had been inquired into; but in no case did the directors ultimately refuse their consent to a transfer.

The bank did not consent to the transfer of any shares after the 3d of September.

The Court is to be at liberty to draw such inferences from the facts above stated as a jury might draw.

The question for the opinion of the Court is, Whether or not is the plaintiff entitled to recover in the said action.

If the Court should be of opinion that he is so entitled, the verdict for the plaintiff is to stand for such sum as the Court shall direct. If the Court should be of a contrary opinion, a nonsuit is to be entered.

The case was argued in the Court of Queen's Bench on 16th January, 1858.

C. W. Wood, for the plaintiff.—The money has been paid by the plaintiff to the defendants upon a consideration which has totally failed; since the shares for which the money was paid have not been transferred, and the directors have not consented to the transfer. [WIGHTMAN, J.—When the plaintiff paid his money, he knew all the circumstances.] He was then bound to *pay his own broker; but he is entitled to [*896 recover the money back from the defendants. The question has been before *Kindersley V. C.*; In re *The Royal British Bank, Ex parte Walton*; (a) who decided that, under such circumstances as the present, the original owner of the shares still remained liable as a contributory,

no transfer having been effected. In *Wilkinson v. Lloyd*, 7 Q. B. 27 (E. C. L. R. vol. 90), the plaintiff bought shares in a company from the defendant, and paid him for them: but the directors refused to permit the transfer: and it was held that the plaintiff might recover back the purchase-money in an action for money had and received, it being the duty of the defendant to obtain the assent of the directors. [WIGHTMAN, J.—The money there was paid before any refusal to transfer was known to the party paying. The plaintiff's broker appears here to have very properly paid the broker of the defendants upon a principle of honour as between the two.] That being so, the plaintiff's broker could have enforced payment from him: *Stray v. Taylor*, 2 Com. B. N. S. 197 (E. C. L. R. vol. 89). (a) [WIGHTMAN, J.—On 3d September, the plaintiff refused to accept the transfer: was not his payment, after that, voluntary? Lord CAMPBELL, C. J.—Is he not bound by what his agent did? COLERIDGE, J.—Is not the payment by the agent, with knowledge of the facts, payment by the principal? Lord CAMPBELL, C. J.—Your client escaped a peril. WIGHTMAN, J.—Did he wish to be registered, after he had learned that the bank had stopped payment?] It was the *897] business of the defendant, or his *broker, to obtain the consent of the directors within a reasonable time: he has not done so; and the failure of the bank has now made the transfer impossible.

Phipson, contra, was not called upon.

Lord CAMPBELL, C. J.—It must be taken that payment was made by the plaintiff with full knowledge of the facts. Nor has anything since occurred to prejudice him. The case is quite distinguishable from *Wilkinson v. Lloyd*, 7 Q. B. 27 (E. C. L. R. vol. 90). As to the case before Vice-Chancellor Kindersley, I agree with him: the plaintiff here is certainly not the shareholder.

COLERIDGE, J.—We decide only that, assuming plaintiff to have had no consideration for his purchase, it was made with full knowledge of the facts; and he cannot recover the money back. He had full notice: the exceptional circumstance of the stoppage of the bank was known to all parties, and stopped the completion of the transfer. After that, the payment was made.

WIGHTMAN, J.—I am of the same opinion. The case falls within the general rule that money paid with full knowledge of the facts cannot be recovered back.

(CROMPTON, J., had left the Court.)

Judgment for defendants.

(a) In Exch. Ch., affirming the judgment of Com. B. in *Taylor v. Stray*, 2 Com. B. N. S. 175.

IN THE EXCHEQUER CHAMBER.

June 14.

THE plaintiff having appealed against this judgment, the case was now argued in the Exchequer Chamber.

*898] *C. W. Wood, for the appellant (plaintiff below), repeated the arguments urged in the Court below.

Karslake, for the respondents (defendants below), was not called upon.

WILLIAMS, J.—I am of opinion that the judgment of the Court of Queen's Bench must be affirmed. It cannot be said that, according to the custom of the Stock Exchange, the time had arrived at which defendants ought to have completed the transfer. When we look narrowly at this claim, it appears that the only ground for it is that the plaintiff has not obtained the transfer for which he paid. But that does not authorize him, under such circumstances as these, to get back his money from the seller.

MARTIN, B., concurred.

WILLES, J., concurred.

BRAMWELL, B.—I am of the same opinion. I think that the committee of the Stock Exchange decided on the ground that the defendants had done all that they were bound to do: and in that I think the committee were right. If, however, they proceeded on the more technical ground, that the transfer was to be completed on a future day, and that the time for completion had not arrived, I do not see what evidence there was that a reasonable time had in fact elapsed. It is said that the transfer has now become impossible. But whose fault is that? It seems to me that the decision of the Court below is both formally and substantially right.

WATSON, B., and BYLES, J., concurred.

Judgment affirmed.

***DALYELL v. TYRER and Others. June 15. [*899**

H., the lessee of a ferry, hired from defendants, for one day, a steam-tug and crew, to assist in carrying his passengers across. He received the fares: and defendants were paid by him for the hire of the tug; they sent and paid the crew. Plaintiff, who had contracted with and paid H. for being carried across the ferry at all times during one year, went on board the tug, from H.'s pier, as a passenger, for the purpose of crossing. By the negligence of the crew some tackle broke; and plaintiff, while on board, was injured. Held, that he was entitled to recover against defendants for such negligence.

THE declaration stated that, at the time of committing the grievances thereafter mentioned, defendants were possessed of a certain steamship, then being navigated by their servants; and plaintiff was then lawfully, and with the consent of defendants, a passenger for hire on board the said steamship; and it then was the duty of defendants to navigate the said steamship with reasonable care and skill, and to provide the same with all fit and proper and necessary tackle and ropes: yet defendants, neglecting their said duty, did not then navigate the steamship with such reasonable care and skill, and did not then provide the same with such fit and proper and necessary tackle and ropes: whereby, and by the breaking of part of the tackle used about the said vessel, plaintiff was struck in the face and greatly injured, &c.

Pleas. 1. Not guilty. 2. That defendants were not possessed of the said steamship navigated by their servants as alleged. 3. That plaintiff was not lawfully and with the consent of defendants a passenger for hire on board the said steamship. 4. That it was not the duty of defendants to navigate the said steamship with the care and skill, and to provide the same with the tackle and ropes, as alleged. Issue on all the pleas.

There was also a special plea, which was demurred to, not material to, or referred to in, the argument or judgment in the present case.

*900] On the trial, before Byles, J., at the last Spring Assizes for Liverpool, it appeared that Hetherington, the lessee and occupier of a steam ferry plying between Liverpool and Rock Ferry, had, on the day in question, hired from the defendants, who represent The Liverpool Steam-Tug Company, one of their steam-tugs, for that day only, to assist him in carrying passengers across between Liverpool and Rock Ferry, there being an unusual number of passengers on that day, owing to a regatta. Hetherington paid the company 10*l.* 10*s.* for the use of the steam-tug for that day, he receiving the ferry fares from the passengers, and the company supplying and paying the master and crew. The plaintiff was a yearly contractor with Hetherington, and was entitled to cross by Hetherington's ferry when and as often as he chose. On the day in question he went on board the steam-tug, at Liverpool, from Hetherington's landing-pier, for the purpose of so crossing. On arriving at Rock Ferry, a bolt, attached to a rope thrown out from the tug to attach it to the pier, broke, through the mismanagement of the master and crew, and struck and injured the plaintiff, who was standing upon the deck.

It was objected, on behalf of the defendants, that, as they must be taken to have transferred, for that particular day, all dominion in the vessel and crew to Hetherington, he, and not the defendants, was liable for any negligence in the management of the vessel; and, further, that the plaintiff, having paid Hetherington for the passage, was not a passenger for hire to be paid to the defendants. The learned Judge reserved leave to move upon both points, and left it to the jury to say, first, whether the defendants had been guilty of negligence, and, if so, and *901] unless the plaintiff had been guilty of negligence, what was the amount of damages. The jury found a verdict for the plaintiff.

Atherton, in last Easter Term, obtained a rule to show cause why the verdict should not be set aside and a verdict entered for the defendants on the pleas of Not guilty and Not possessed, "on the grounds that the master and crew" of the tug "were not the servants of the defendants at the time of the accident," "or persons for whose negligent navigation the defendants were responsible in point of law; and also why a verdict should not be entered for the defendants on the third plea, on the ground that the plaintiff was not a passenger for hire payable or to be paid to the defendants; and also why a verdict should not be entered for the defendants on the fourth plea, on the grounds that no distinct matter of fact was proved in support of the averment of duty traversed by the fourth plea," "and that the facts stated without such averment do not raise the duty;" or why the judgment should not be arrested, "on the ground that the declaration does not show any contract or other ground of action against the defendants for the negligence relied on."

Edward James and *C. Milward* now showed cause.—First, the defendants are liable for the negligence of the master and crew. The jury have found that there was such negligence; and the master and crew were found and paid by the defendants, and, as regarded the management of the vessel, were entirely under their control and authority, and were their servants, not Hetherington's. The defendants, therefore, are responsible for the negligence of their servants, according to

the result *of *Laugher v. Pointer*, 5 B. & C. 547 (E. C. L. R. vol. 11), *Quarman v. Burnett*, 6 M. & W. 499,† and *Milligan v. Wedge*, 12 A. & E. 737 (E. C. L. R. vol. 40). *Allen v. Hayward*, 7 Q. B. 960 (E. C. L. R. vol. 53), shows upon what principles to determine whether or not the relation of master and servant exists between the employer and employed, so as to render the former liable for the misfeasance of the latter. *Fenton v. The City of Dublin Steam Packet Company*, 8 A. & E. 835 (E. C. L. R. vol. 35), is precisely in point. *Schuster v. McKellar*, 7 E. & B. 704 (E. C. L. R. vol. 90), is also an authority for the plaintiff. [ERLE, J.—The decision in that case turned rather upon the particular facts of the case, as regarded the position of the owner of the ship.] The general principle is laid down by the Court in giving judgment. Here, as in that case, the owner of the ship is in possession of it by his master and crew: the hiring by *Hetherington* was a *locatio navis et operarum magistri et nauticorum*: and the owner therefore, and not the hirer, is liable for negligence in the management of the ship.

Secondly, it is contended that, as the plaintiff paid *Hetherington*, not the defendants, for his passage, he was not a passenger for hire on board the steam-tug, as alleged in the declaration. But he was “lawfully” “on board,” as “a passenger,” “with the consent of defendants,” as alleged; and, that being so, he is entitled to sue them for negligence in the management of the vessel, which the defendants must be held to have undertaken, with him and the other passengers, to navigate with proper care. The question as to hire, in that case, becomes immaterial: *Pippin v. Sheppard*, 11 Price 400; *Gladwin v. Steggall*, 5 New Ca. 733 (E. C. L. R. vol. 35): which decisions are noticed and upheld by *the Court in *Longmeid v. Holliday*, 6 Exch. 761.† *Marshall v. The York, Newcastle, and Berwick Railway Company*, 11 Com. B. 655 (E. C. L. R. vol. 73), is also an authority as to this point. [*903]

Thirdly, as the jury have found that there was negligence on the part of the defendants in the management of the vessel, the averment in the declaration, that it was the duty of the defendants to use reasonable care and skill in navigating the vessel, was proved.

Atherton and J. C. Heath, contra.—First, the master and crew were the servants of *Hetherington*, not of the defendants. *Hetherington* had clearly contracted with the plaintiff to carry him with proper care; and that distinguishes the case from *Laugher v. Pointer*, 5 B. & C. 547 (E. C. L. R. vol. 11), and that class of cases, cited for the plaintiff, where the action was independent of and apart from any contract whatever with the plaintiff. Here the declaration sets up a cause of action of tort, founded on a contract; the action, therefore, must be brought against the person with whom the contract is made, that is, *Hetherington*: *Colvin v. Newberry*.(a) [ERLE, J.—But, in case of misfeasance, is not the person immediately guilty of it liable, at all events, as well as the contracting party?] Not in an action founded on the contract: *Jennings v. Rundall*, 8 T. R. 335; *Winterbottom v. Wright*, 10 M. & W. 109.† That principle is recognised in *Legge v. Tucker*, 1 H. & N. 500,†

(a) In Dom. Proc. 1 Cl. & F. 283, affirming the judgment of Exch. Ch. in *Newberry v. Colvin*, 7 Bing. 190 (E. C. L. R. vol. 20); S. C. 1 Cr. & J. 192;† which reversed the judgment of K. B. in *Colvin v. Newberry*, 8 B. & C. 166 (E. C. L. R. vol. 15).

*904] and *Blakemore v. Bristol and Exeter *Railway Company*, 8 E. & B. 1035 (E. C. L. R. vol. 92). The contract was with Hetherington: the master and crew, therefore, are liable, if at all, as the servants of Hetherington; and therefore the second plea, which alleges that the defendants were not possessed of the ship, navigated by their servants, is sustained.

Secondly, the plaintiff, as has already been contended, was not a passenger for hire on board the steam-tug: and, if not, the defendants are not liable. The cases cited for the plaintiff on this point are distinguishable. In *Marshall v. The York, Newcastle, and Berwick Railway Company*, *Pippin v. Sheppard*, and *Gladwell v. Steggall*, there was a distinct retainer: just as in *Coggs v. Bernard*, 2 Ld. Raym. 909, there was a contract with the plaintiff to deal carefully with the goods. [ERLE, J.—If Hetherington pays the defendants for the use of the ship to carry the plaintiff, and they do so carry him, are they not retained, for hire and reward, to carry the plaintiff? Suppose A., at B.'s request, pays a surgeon to attend B., and the surgeon maltreats B., is not the surgeon liable at the suit of B. ?] Not in an action founded on a contract between B. and A.

Thirdly, the duty alleged in the declaration and traversed by the fourth plea was not proved. That depends upon the questions already argued as to the liability of the defendants to the plaintiff under their engagement with Hetherington, and his engagement with the plaintiff.

Fourthly, the declaration is bad in arrest of judgment. If the words as to hire in the declaration be struck out, the declaration shows no liability on the part of the *defendants: if the words remain, they
*905] must be construed according to the facts proved; and the only hiring proved is a hiring of Hetherington, which would not render the defendants liable: *Dartnall v. Howard*, 4 B. & C. 345 (E. C. L. R. vol. 10).

(WIGHTMAN, J., was absent.)

ERLE, J.—I am of opinion that this rule should be discharged. I take it to be shown by the evidence that the plaintiff had made a contract with Hetherington to be conveyed across the ferry; and, for the purpose of being so conveyed, went on board the vessel hired, with its crew, for that purpose, by Hetherington from the defendants, and, while on board, suffered injury from the negligence of the crew. The question is, are the defendants liable for that negligence? They were, by their crew, in possession of the vessel; and I am of opinion that, if the negligence in question had injured a mere stranger, not on board, but standing, for instance, on the pier at the time, they would have been liable. That is established by *Quarman v. Burnett* and *Fenton v. The City of Dublin Steam Packet Company*. Then, can the plaintiff lose a right of action which he would have had as a stranger merely because he was a passenger for hire paid to Hetherington, and not to the defendants? He clearly loses no right of action against them, though he may possibly acquire an additional right against Hetherington. *Pippin v. Sheppard*, *Gladwell v. Steggall*, and *Marshall v. The York, Newcastle, and Berwick Railway Company*, decide that the question whether
*906] there was an actual retainer of the defendants by the plaintiff for hire does not affect their liability for negligence of this character. It was much pressed upon us that the declaration was not

proved. I am of opinion that it was proved, taking the words of it in their ordinary meaning. That the plaintiff was a passenger for hire was, I think, proved by the evidence that he had hired Hetherington to convey him, and that Hetherington had hired the defendants for that purpose. It was also proved that the plaintiff was on board the vessel with the consent of the defendants, and, as I have already said, that they were in possession of the vessel. I further think that, making all intendments in favour of the plaintiff, as, the above facts being proved, we ought to do, the allegation as to the duty of the defendants to provide proper tackle and to navigate with reasonable care was also proved; and negligence in the navigation was clearly shown. The substance of the case, therefore, is in favour of the plaintiff; and, for the reasons which I have given, I think the technical objections cannot be sustained.

(CROMPTON, J., was absent.)

HILL, J.—It is clear, according to the principle laid down in *Laugher v. Pointer*, and a series of authorities, most of which are cited in the argument and judgment in *Quarman v. Burnett*, that the crew of the steam-tug were the servants of the defendants. The defendants had hired and paid them, had entire control over them, and had power to substitute others in their place; and the defendants also had power to *add to or alter any portion of the tackle of the vessel. They were, therefore, responsible for any negligence of the crew, or failure of the tackle. I think, moreover, that it is wholly immaterial whether or not the plaintiff was a passenger for hire, either with Hetherington or with the defendants. If he had been a mere stranger, standing on the pier at the time, and had been injured, he would have had a right of action against the defendants; and that right is certainly not destroyed by the fact of his being on board, as it is clear he was, with the consent of the defendants, even if not for hire payable to them. As to the third point, I think that the allegation as to the duty of the defendants must be read as my brother Erle takes it; and that, so reading it, it is quite clear that it was the duty of the defendants to navigate the vessel so as not to endanger the life or limbs of any persons, and that they failed in their duty. The declaration, therefore, in my opinion, is proved; and the rule must be discharged.

Rule discharged.

LUCAS and Another v. BRISTOW. *June 16.*

Plaintiffs sold to defendant "50 tons best palm oil, expected to arrive" "per The Chalco," "at 40*l.* 10*s.* per ton:" "wet, dirty, and inferior, oil, if any, at a fair allowance." The oil, on arrival, contained one-fifth only of "best" oil. In an action for not accepting the oil: Held, that oral evidence was admissible to show that, according to mercantile usage, the contract in question was satisfied if the oil delivered contained a substantial portion of "best" oil: and such evidence was for the jury.

THE declaration stated that defendant bought of plaintiffs, and plaintiffs, at defendant's request, sold to him, 50 tons best palm oil, expected to arrive in Bristol from Africa per The Chalco, after the delivery *of 100 tons previously sold, at the price of 40*l.* 10*s.* per ton, with usual tare and draft, upon the terms that wet, dirty, and

inferior oil (if any) should be taken at a fair allowance, and that, if any difference should arise thereon, the same should be settled by arbitration; and also that payment should be made by cash on delivery, less $2\frac{1}{2}$ per cent. discount, at the end of fourteen days from being ready for delivery in Bristol: that afterwards the said palm oil did arrive in Bristol per The Chalco; and that, after the delivery of the said 100 tons previously sold, there still remained the said 50 tons of palm oil ready for delivery to the defendant, and plaintiffs were at all times ready to have delivered the same to defendant, and to make him a fair allowance upon the agreed price thereof for so much of the said oil as was wet, dirty, and inferior, and did all things on their part to be done, and all things happened, to entitle them to have the said palm oil accepted and paid for by defendant; but defendant would not accept or pay for the same; and the same remained on plaintiffs' hands; and they were compelled to resell the same at a loss, and were put to expenses upon such resale.

Count for goods bargained and sold, interest, and on accounts stated.

Pleas. 1, 2, 3, to the first count, traversing, respectively, the sale, the arrival of the oil, and plaintiffs' readiness and willingness to deliver.

4. To first count: That the oil which arrived by The Chalco, and which plaintiffs were ready and willing to deliver to defendant, was not best palm oil, or fairly within the description in the contract, but was of a totally different quality, which difference in quality was so great and of such a nature as not to be the subject of allowance within the true intent and meaning of the said contract.

*909] *5. To residue of declaration: Never indebted.

Issue on all the pleas.

On the trial, before Crowder, J., at the last Assizes for Bristol, it appeared that the action was brought to recover the amount of loss sustained by the plaintiffs upon the resale of 50 tons of palm oil, the defendant having refused to accept it.

On 30th August, 1856, Dale, Morgan & Co., brokers in London, bought of the plaintiffs, through their brokers, for the defendant, the oil in question, and sent to the plaintiffs the following sold note.

"London, 30th August, 1856.

"Sold this day, for Messrs. Lucas Brothers and Company, to Mr. John Bristow, 50 tons best palm oil, expected to arrive in Bristol from Africa per The Chalco, after delivery of one hundred tons previously sold, at forty pounds ten shillings per ton, usual tare and draft.

"Wet, dirty, and inferior oil, if any, at a fair allowance; and if any difference should arise the same to be settled by arbitration. Payment by cash on delivery, less $2\frac{1}{2}$ per cent. discount, end of fourteen days from being ready for delivery in Bristol.

"DALE, MORGAN & Co., Brokers."

The Chalco arrived at Bristol on 17th October, 1857. Messrs. King, the brokers who had purchased the cargo of The Chalco for the plaintiffs, divided the whole cargo into five portions, of different quantities, and, as to four of them, stated the allowances which should respectively be made in respect of inferior oil. About 60 tons (i. e. about one-fifth of the whole cargo) were best oil: the rest was mixed with palm nut oil, an inferior kind. The 50 tons allotted to the defendant comprised their

*910] *proper amount of best oil in proportion with the rest of the cargo. The defendant disputed the correctness of these allowances. The

cargo was again sampled, and larger allowances made, by arbitrators named by Messrs. King and the plaintiffs; and the other part of the cargo was sold at these allowances. The defendant refused to accept the 50 tons: and the plaintiffs resold it at a loss.

Evidence was tendered, on behalf of the plaintiffs, that, according to mercantile usage, a contract for "best" palm oil did not imply any particular proportion of best oil; but that the contract was complied with if the oil delivered contained, at all events, a substantial portion of best oil; the word "best" being used only as a standard of price. The defendant's counsel objected to the reception of this evidence. The learned Judge admitted it; and left it to the jury to say, first, whether the contract was made according to mercantile usage; and, if so, secondly, whether the plaintiffs had satisfied the contract according to that usage; and directed them, in that case, to find a verdict for the plaintiffs. The jury found a verdict for the plaintiffs.

Collier, in last Easter Term, obtained a rule Nisi to set aside the verdict, and for a new trial, "on the grounds that the evidence of mercantile usage was not, under the circumstances, admissible;" and "that the learned Judge misdirected the jury in telling them to find for the plaintiffs, if, according to the mercantile usage, the plaintiffs had satisfied the contract; and that the verdict was against evidence." (a)

Montague Smith and *Barstow* now showed cause.—The *evidence of mercantile usage was properly admitted. It does not [911 vary the contract, but explains it. The contract itself shows that the cargo was not to consist entirely of best oil; and the evidence of usage explains what proportion of best oil, in addition to what might turn out "wet," "dirty," or "inferior," will satisfy the contract. The language of the contract is consistent with the evidence tendered; and the evidence is therefore admissible. In *Brown v. Byrne*, 3 E. & B. 703 (E. C. L. R. vol. 77), (b) it was held that the construction of the following clause in a bill of lading, "freight for the said goods five-eighths of a penny sterling per pound, with five per cent. primage, and average accustomed," was not inconsistent with the custom, which was admitted, of allowing three months interest or discount upon freights payable for goods coming, as the goods in question did, from a particular port. Evidence of this kind is admissible unless, as is laid down by Lord Campbell, C. J., in *Humfrey v. Dale*, 7 E. & B. 266, 274 (E. C. L. R. vol. 90), (c) "it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument." The objection to this evidence amounts, in fact, to contending that the learned Judge was bound, at the trial, to decide what amount of best oil would satisfy the contract: that is not a matter within the province of the Judge. On the motion for the rule Nisi, *Yates v. Pym*, 6 Taun. 446 (E. C. L. R. vol. 1), was relied upon. But the contract there was an express and definite contract for a particular article, and did not contain, as this does, a provision which renders the whole susceptible of explanation.

(a) There was another ground, viz., the non-admissibility of evidence, by the purchaser of the remainder of the cargo, that his contract contained a clause similar to that of the defendants. This ground was not brought forward in support of the rule.

(b) See *Hall v. Janson*, 4 E. & B. 500, 510 (E. C. L. R. vol. 82).

(c) In Q. B. Judgment affirmed in Exch. Ch.; *Dale v. Humfrey*, post, p. 1004.

*912] *Collier and Coleridge*, contrà.—It would be going far *beyond the limits laid down by the authorities, as to the explanation of written contracts by oral evidence, to construe this agreement in connection with the evidence of usage which was given at the trial. The ordinary meaning of the contract is, that what is bought is “best palm oil.” The evidence in question does not vary this contract, or add a tacitly implied incident to it; but it directly contradicts the tenor of the written instrument, and therefore is inadmissible, according to the rule laid down in *Humfrey v. Dale*, 7 E. & B. 266, 274 (E. C. L. R. vol. 90). It goes in fact to show that a contract has been substantially satisfied, which, on the face of the written instrument, has not been substantially satisfied. In *Brown v. Byrne*, 3 E. & B. 703 (E. C. L. R. vol. 77), the evidence was not inconsistent with or repugnant to the written contract. *Yates v. Pym*, 6 Taun. 446 (E. C. L. R. vol. 1), and *Spartali v. Benecke*, 10 Com. B. 212 (E. C. L. R. vol. 70), show that oral evidence is not admissible to explain a contract which is perfectly unambiguous on the face of it.

(WIGHTMAN, J., was absent.)

ERLE, J.—I am of opinion that this rule should be discharged. Contracts ought to be enforced according to the intention of the parties; and here it must be taken that the parties purposely left undefined what was to be the proportion of “wet, dirty, and inferior” oil. They were both engaged in the palm oil trade, and would be aware that there was great uncertainty as to the proportions of good and inferior oil in each cargo; and therefore they may well have made the contract on the

*913] understanding that such proportions should not be *specified. Then, in determining whether the contract has been substantially complied with, oral evidence is admissible to define that which the written instrument has left undefined. The question would be just the same, whether four-fifths, or, as here, one-fifth only, of the cargo were best oil. What is to be determined is, the proportion of good and inferior oil which would satisfy the contract. Who is to determine this? It is clearly not within the province of the Judge, who has no local or technical knowledge on the point, to decide it. Nor can the jury, who have not necessarily any local or technical knowledge, decide it upon their own judgment. They must determine it; but upon evidence given by mercantile witnesses who do possess local and technical knowledge. The case seems to me to fall within the principle of *Brown v. Byrne*, 3 E. & B. 703 (E. C. L. R. vol. 77), in which many of the leading authorities are reviewed.

(CROMPTON, J., was absent.)

HILL, J.—I also am of opinion that this rule should be discharged. The parties to the written contract are silent as to what proportion of wet, dirty, and inferior oil the cargo may contain. But it appears that there is an established usage in the palm oil trade as to what proportions will satisfy a contract to deliver “best” palm oil. It is clear, upon the authorities, that evidence of this usage is admissible to explain that which is left undefined in the contract; and it is for the jury to decide upon the weight of such evidence.

Rule discharged.

*IN THE EXCHEQUER CHAMBER. [*914

SIMEON WARBURG v. WILLIAM OWEN TUCKER. *June 16.*

Defendant, being indebted to plaintiff, assigned to him, as security, an insurance on defendant's life, and an insurance on the life of defendant's wife, and covenanted to pay the premiums. Plaintiff sued defendant on this covenant, assigning as a breach that defendant had not paid the premiums. Defendant, to this breach, pleaded his bankruptcy and certificate, averring that they had occurred after the execution of the deed, but not that they had occurred after the breaches had taken place.

Held, on demurrer to the plea, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the plea gave no answer to the declaration, the claim not being in respect of, nor a liability to pay money upon, a contingency, within sect. 178 of The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106.

THE declaration was dated 30th April, 1856.

The first count charged that, on 29th May, 1854, by a deed between plaintiff of one part and defendant of the other part, after reciting that defendant was entitled to a policy of assurance on his own life in The West of England Life Assurance, bearing date 7th March, 1849, and numbered 19330, for the sum of 1000*l.*, and under the annual premium of 4*l.* 0*s.* 2*d.*, and also to another policy of assurance on his own life, in the same office, bearing date 6th March, 1850, and numbered 19936, for the sum of 500*l.*, and under the annual premium of 23*l.* 16*s.* 3*d.*, and also to a policy of assurance on the life of Matilda Elizabeth Tucker, his wife, in the same office, bearing date 5th April, 1854, and numbered 22159, for the sum of 1000*l.*, and under the annual premium of 50*l.* 19*s.* 2*d.*; and that defendant was indebted to plaintiff in the sum of 2450*l.* for moneys advanced and arrears of interest thereon to that day: defendant did thereby assign unto plaintiff, his executors, administrators, and assigns, all those the said three policies of assurance, respectively thereinbefore particularly *mentioned, and the full [*915 benefit and advantage of the said policies, respectively, and the said several sums of 1000*l.*, 500*l.*, and 1000*l.*, thereby respectively assured, and all other moneys (if any) to become payable by virtue of the said policies, or any of them, and all the right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of defendant to, in, upon, or out of the same premiums, and each of them, to have, hold, receive, and take the said policies and moneys, and all other the premises thereby assigned or expressed so to be, unto plaintiff, his executors, administrators, or assigns; subject, nevertheless, to the proviso for redemption thereafter mentioned, whereby it was provided and agreed, &c.; provision for reassignment, in case of payment of 2450*l.* and interest on 29th August then next. And defendant did thereby, for himself, his heirs, executors, and administrators, covenant with plaintiff, his executors, administrators, and assigns, that he, defendant, his heirs, executors, and administrators, should thenceforth duly and punctually pay or cause to be paid the annual premiums and other sum or sums of money (if any) which should from time to time become payable for keeping on foot the aforesaid policies thereinbefore assigned or expressed so to be. And it was thereby declared that, in case defendant, his heirs, executors, or administrators, should neglect to make such payments as aforesaid, it should be lawful for plaintiff, his

executors, administrators, or assigns, to pay or advance all premiums or other sums of money which might become payable for keeping on foot the said policies of assurance, respectively, or for effecting or keeping on foot any new policy or policies in lieu thereof; and that defendant, *916] his executors, administrators, or assigns, would on demand pay to plaintiff, his executors, administrators, or assigns, all moneys (if any) so paid or advanced by him as last aforesaid, with interest thereon, at the rate of 4l. per cent. per annum, from the time, or respective times, of the same having been expended. Breaches. That, although all conditions precedent, and necessary matters and things, on the part of plaintiff, have been done, performed, and happened, so as to entitle him to have the annual premiums hereinafter mentioned paid by the defendant and repaid to him, the plaintiff, by the defendant, yet defendant did not pay or cause to be paid divers annual premiums which, after making the said deed, became payable for keeping the said policies on foot, and neglected so to do: 2. And, although, after defendant had so neglected, plaintiff duly paid and advanced the said premiums, whereof the defendants afterwards had notice, and plaintiff duly demanded of defendant payment of the moneys so advanced, yet defendant did not pay the same, or any interest thereon, but therein wholly failed and made default.

Count 2, on accounts stated.

Plea 1. As to the first breach of covenant assigned in the first count, that the deed in that count mentioned was made solely as a security for the payment by defendant of the said debt of 2450l. therein mentioned; and that, before and at the respective times of the defendant making the said deed and filing such declaration, and becoming such bankrupt as hereinafter mentioned, and continually from each of those times respectively until the date and the petition for adjudication hereinafter *917] mentioned, he was a trader liable to be made bankrupt, and carried on business, for six calendar months next immediately preceding the filing of the petition, within the jurisdiction of the Court of Bankruptcy for the district. That, after making the deed, he filed a declaration of insolvency, and, within two months of that, petitioned for adjudication in bankruptcy in the said Court. The plea then showed the proper proceedings in bankruptcy, that defendant was adjudged bankrupt, surrendered, &c.; and that, before the commencement of this suit, the commissioner of the Court allowed the certificate of conformity, dated 7th February, 1855. That, at the time of the making of the deed, plaintiff did not have, nor had he then, notice of any act of bankruptcy by defendant committed: and the certificate was still in full force.

Plea 2. A similar plea to the second breach in the first count.

Plea 3 and 4, to the second count, not now material.

Replication. As to so much of the first plea as relates to 66l. 10s. 11d., matter not now material.

As to the residue of the plea, Demurrer.

As to so much of the second plea as relates to 66l. 10s. 11d., matter not now material.

As to the residue of the plea, Demurrer.

Issue on the third and fourth pleas.

Rejoinder. Traverse of the matters in the first part of the replication to the first plea.

Demurrer to the first part of the replication to the second plea.

Joinder in demurrer, as to the residue of the first and second pleas.

*Surrejoinder. Issue on the traverse, and Joinder on the [918 Demurrer, to the replication.

In Easter Term, 1857,^(a) judgment was given for the plaintiff on the demurrers, without argument.

At the Middlesex Sittings after Trinity Term, 1857, before Lord Campbell, C. J., a verdict was found for the plaintiff on the issue arising out of the first count, and for the defendant on the issues arising out of the second count. Damages on occasion of the breaches in the first count, 116*l.* 1*s.*

In Michaelmas Term, 1857, judgment was signed: That the plaintiff receive the moneys assessed, and also for costs of suit; and that defendant go without day as to the premises whereof he was acquitted.

The defendant, in the Court of Exchequer Chamber, alleged error: which plaintiff denied.

The case came on for argument on February 8th, 1858, when *Garth*, who appeared for the party assigning error (defendant below), requested that it might be postponed, he having not been duly instructed.

Atherton, being called on to state the case for the party denying error (plaintiff below), referred to the argument and judgment in the previous case between the same parties, *Warburg v. Tucker*, 5 E. & B. 384 (E. C. L. R. vol. 85); and also to *Young v. Winter*, 16 Com. B. 401 (E. C. L. R. vol. 81); and to *Ex parte Barwis*, 25 L. J. N. S. Bank. 10. [BRAMWELL, B., referred to *Elder v. Beaumont*, 8 E. & B. 353 (E. C. L. R. vol. 92).]

On a previous day in this Vacation (June 14th),

Garth argued for the party alleging error (defendant *below).— [919 The case falls within sect. 178 of The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106). By that section it is enacted: "That if any trader who shall become bankrupt after the commencement of this Act shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this Act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit; and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends, provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed; provided also, that where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the

(a) April 28th.

(b) 8 Bing. 402 (E. C. L. R. vol. 21).

application of the assignees at any time after the expiration of such time, and if the Court shall think fit, be expunged either in whole or in part from the proceedings." This is a case of a liability to pay money on a contingency which had not happened before the filing of the petition, contracted before the filing of the petition. It is not like a covenant to *920] repair or to indemnify; it is a direct covenant *to pay money upon the contingency that the life shall continue and the debt remain unpaid. The claim is to be made for such sum as the Court shall think fit: the proof cannot be admitted till after the contingency has happened. The fallacy in the reasoning of the Court of Queen's Bench in the former case of *Warburg v. Tucker*, 5 E. & B. 384 (E. C. L. R. vol. 85), is that they seem to assume that the commissioner, when he admits the claim, has to put a value on the liability. The provision, however, of sect. 178 is analogous to that in sect. 174 with regard to bottomry or respondentia bonds. As to the general intention of the Legislature to make the bankrupt a free man by relieving him from all liabilities, there appears to be no difference of opinion. It is true that claims which really are for money often sound in damages: but the amount may generally be got at. For instance, the provision of sect. 178, now under consideration, is confined to a liability to pay money: and the damages may be estimated, if the plaintiff has paid the money which the defendant ought to have paid, by the money so paid; if there has been no such payment, then by the value of the policy. In this there is no more difficulty than in the case of insurance, sect. 174. In the case of *Ex parte Tindal*, 8 Bing. 402 (E. C. L. R. vol. 21), under stat. 6 G. 4, c. 16, s. 56, it was held that the commissioners might value a debt, arising upon covenant, where it did not appear who would be the persons entitled to the benefit. It is true that the Court there said that, if it was uncertain whether any, or how many, such persons would come into existence, the valuation could not be made: but the provision *921] of sect. 178 of stat. 12 & 13 Vict. c. 106, was introduced *for the purpose of meeting that difficulty; and it may be remarked that its machinery differs entirely from that of sect. 177, where the commissioner has to value the debt. In *Young v. Winter*, 16 Com. B. 401 (E. C. L. R. vol. 81), the Court of Common Pleas held that the bankruptcy constituted a defence to a claim precisely similar to that in the second breach in the first count here. *Ex parte Barwis*, 25 L. J. N. S. Bank. 10, confirms the authority of *Young v. Winter*. Any injustice which may arise from a delay in the proof may be remedied by the exercise of the discretion of the commissioner, provided for by the concluding part of sect. 178. The claim may be expunged in the application of the assignees. *Alsop v. Price*, 1 Doug. 160, shows the state of the old law. It was said, in the judgment in the Queen's Bench: (a) "We do not think that provision is made by the section for a case like this, where there are to be successive payments on successive contingencies during the whole of the lives of two individuals and the life of the survivor. The plaintiff, in seeking a remedy under the fiat, must first have made a claim for such a sum as the Court should think fit. It is difficult to say on what principle the Court could proceed in fixing this sum. But, supposing a sum to be fixed, insuperable difficulties present them-

(a) 5 E. & B. 395 (E. C. L. R. vol. 85).

selves before the plaintiff could be entitled to receive dividends with the other creditors. The successive contingencies here, on which the defendant becomes liable in consequence of the breach of the covenant, are the non-payment by the defendant of the annual payment of the premium from year to year on each of the three policies, the plaintiff's paying these premiums or reinsuring after the policies were forfeited, and the plaintiff making a demand upon the defendant for the *amount of the money so advanced. But the section seems to [922 contemplate only the happening of one contingency whereupon the whole demand in respect of the liability shall be ascertained; and thereupon 'he shall be admitted to prove such demand, and receive dividends with the other creditors.' Suppose that there had been a single default on the part of the defendant in non-payment of one annual premium on one policy; it would only be by reason of this default that the plaintiff could make a demand and be entitled to a dividend. Notwithstanding the defendant's bankruptcy and certificate, he might pay or cause to be paid 'all the other premiums according to his covenant; and the contingencies on which subsequent payments were to be made by him to the plaintiff might never happen. The section seems to contemplate and to make provision only for one demand, depending upon the happening of one contingency.'" But the payments which are to be made are not successive payments on one account: they constitute independent and distinct liabilities within the meaning of sect. 178, as much as if they were due upon separate deeds. Upon the construction given to the section in the Court below, it is difficult to understand the provision that the claim may be "expunged either in whole or in part." As to the cases cited below, *Toppin v. Field*, 4 Q. B. 386 (E. C. L. R. vol. 45), was a decision on sect. 56 of stat. 6 G. 4, c. 16, which corresponds with sect. 177 of stat. 12 & 13 Vict. c. 106. Under those sections there must be a "debt," which there was not in *Toppin v. Field*. In *Hankin v. Bennett*, 8 Exch. 107,† the Court notice the extension of the previous law by sect. 178 of stat. 12 & 13 Vict. c. 106, and intimate that what they then held not *provable as a debt might be claimed under [923 the new Act as a liability. In *re Willis*, 4 Exch. 530,† and *Ex parte Myers*, Mont. & Bl. 229, where the claims were held to be provable, as debts, are applicable only to cases under sect. 56 of the earlier Act and sect. 177 of the present Act. The same remark applies to *South Staffordshire Railway Company v. Burnside*, 5 Exch. 129,† where the claim was held not to be provable. So *Bennett v. Burton*, 12 A. & E. 657 (E. C. L. R. vol. 40), referred to in *Young v. Winter*, 16 Com. B. 407 (E. C. L. R. vol. 81), arose on a claim under the Insolvent Debtors Act, 7 G. 4, c. 57, s. 51, which is very different in its language from sect. 178 of stat. 12 & 13 Vict. c. 106.

The case stood over for further argument: but, in the meantime, the *postea* was amended at Chambers, by entering the finding of the damages at 116*l.* 1*s.* on each breach of the first count.(a) And now

T. Jones (Northern Circuit) appeared for the party denying error (plaintiff below), and informed the Court of the amendment; and he stated that he would enter a remittitur of the damages on the second breach of the first count. (The Court then stated that he need not argue as to the point on the first breach.)

(a) Each breach was in fact assigned in respect of the same claim.

WILLIAMS, J.—I am of opinion that the judgment of the Court below should be affirmed. The declaration is on two breaches of covenant: the first, the non-payment of the premiums by the defendant; the second, the non-payment by the defendant to the plaintiff of premiums paid by *924] the plaintiff under the terms of the *covenant. But we may now treat the case as if the second breach had not been assigned at all, the damages upon that breach having been remitted subsequently to the amendment. Taking the first count, therefore, as containing only the first breach, the Court are unanimously of opinion that the bankruptcy constitutes no bar. We need only say, as to the second breach, with reference to the argument which has been addressed to us, that there is undoubtedly a conflict of authorities. In *Young v. Winter*, 16 Com. B. 401 (E. C. L. R. vol. 81), the Common Pleas pronounced decisions on two breaches of covenant exactly the same as those in the present action. They held that, as to the first breach, bankruptcy was no bar: but that it was a bar as to the second breach; the Court of Queen's Bench having held that it was no bar as to either breach. The Courts therefore are in conflict as to the second breach; but they agree, as to the first, that bankruptcy is no bar. The Court of Common Pleas did not distinctly assign the grounds of their decision as to the first breach: but they are most satisfactorily shown by a case which was not cited in the present argument, *Maples v. Pepper*, 18 Com. B. 177 (E. C. L. R. vol. 86). There the Court of Common Pleas held that damages arising from a non-performance of an engagement to restore premises to their original state, which engagement constituted the condition of a permission to alter them, was not, within sect. 178, a liability to pay money on a contingency. *Jervis, C. J.*, after pointing out that there was only a liability to restore the premises, or give such compensation in damages as a jury might award, said that the Court could not do better than follow the decisions in *Young v. Winter*, 16 Com. B. 401 (E. C. L. R. vol. 81) and *925] *Warburg v. Tucker*, 5 E. & B. 384 (E. C. L. R. vol. 85). *That was a decision, not that there was not a liability on a contingency, but that there was no liability to pay money on a contingency. The thing might or might not occur: if it did occur, the jury were to assess proper damages. That is the way in which *Willes, J.*, puts it in *Maples v. Pepper*, 18 Com. B. 177 (E. C. L. R. vol. 86). He says: "It is true that the defendant, if he failed to perform his agreement, might be liable to pay money in the shape of damages. But, is that a liability to pay money upon a contingency? Certainly not. It is not a liability to pay money till it results in damages; and then it is a liability to pay money absolutely, and not upon any contingency." I will only add that the joint opinion of the Courts of Queen's Bench and Common Pleas accords with the view of Lord Justice Turner in *Ex parte Barwis*, 25 L. J. N. S. Bank. 10. The Judgment of the Court of Queen's Bench in the present case, as to the first breach, is therefore to be affirmed, but in consideration of the amendment, without costs.

MARTIN, B.—I am of the same opinion. The defendant enters into a plain and intelligible contract, which is beneficial to the plaintiff. To relieve himself from this contract, the defendant should show an intention of the Legislature as clear as his obligation. He relies upon his bankruptcy. Of the intention of the Legislature, I know nothing but what they have enacted. I look at what they say in plain and express

terms. Look at the language of sect. 178. What is the nature of the liability on this contract? In substance it is this: that the defendant, by payment of the premiums, will secure to the covenantee the benefit of the insurance. If they are *not paid, the insurance is lost. I should say that the value of the policy measured the amount of [*926 the claim; because the breach of the covenant to pay the premiums deprives the covenantee of the advantage which would have accrued to him if the policy had been kept up. The liability which the defendant, by breach of his covenant, has incurred is not a liability to pay money on a contingency; and I am most clearly of opinion that the bankruptcy is not, under sect. 178, an answer to the complaint in respect of the first breach. On the second breach it is not necessary for me to say anything, though on that point I have a very strong opinion.

BRAMWELL, B.—What is the covenant in this case? It is that, if the insured parties live, and the debt continues, the defendant will pay the premiums. Mr. Garth says that we may consider the defendant to have entered into several covenants for the payment of the several premiums. If that be so, what I am saying applies only to the non-payment of the first premium. Then, as to the second premium, the case becomes more and more contingent. I have much doubt whether this is a liability to pay money on a contingency, within sect. 178. But what is the liability? Not to pay a definite sum to the covenantee, but to make payments which are of the utmost uncertainty. So, although the covenantor may have to pay particular sums of money on a certain contingency or contingencies, still his obligation is not a liability to pay those sums to the covenantee. There may be a question whether he is or is not liable to the covenantee to the full extent of the value of the policy. Now what is that? It is a sum which we could not, a priori, fix at all. The liability, spoken *of in the section, to pay money [*927 on a contingency exists in a case where, if the money be not paid upon the contingency occurring, there is a precise amount due and left unpaid. But I think it does not exist in a case where the liability to the creditor is greater or less according to circumstances. It seems to me, therefore, that the difficulty occurs which my brother Williams points out. There is also this further difficulty. The plaintiff could not have claimed for the whole amount of the debt, and also for the non-payment of these premiums. He would have been claiming against the estate for more than the entire of that for which the defendant undertook; for the covenant is made by the defendant as surety. The plaintiff might keep up the security; or the policy might have been valued and sold; he could not have this and a separate proof for the original debt. The truth is that this is not a separate and independent claim such as the statute contemplates. It is a security for a debt: and I much think that this affords a solution of the question. If the creditor, being entitled to payment of the debt, does not choose to prove it, he cannot be compelled to do so. But, if he does prove the debt, he must bring in the security and have it valued. I think there is also another view of the subject. The certificate of conformity discharges the bankrupt from all that is made provable under the bankruptcy. Mr. Garth says that making the claim under sect. 178 is not a proof. But, if so, the case is not within sect. 200; for I cannot help thinking that this section refers only to what is actually provable, not to what

remains contingent. The creditor is not to be kept in a halting position. Mr. *Garth* says that the claim will ripen to proof. It will so, if it remains alive *and is not struck out. But suppose the contingency does not happen within six months after the filing of the petition. Is the creditor to be precluded? That seems to me monstrous: he would have the benefit of neither an action on the covenant nor the proof under the bankruptcy. Therefore it seems to me that sect. 200 applies only to cases where the creditor has an absolute right of proof: and this creates in my mind a great difficulty as to the suggested defence. I need not inquire how far what I have said applies to the second breach.

WATSON, B.—I am of the same opinion. I have not considered all the points suggested by my brother Bramwell. But the argument for the defendant is that whatever is provable is barred by the certificate; and that this claim is so provable. But I think it is not a claim on a liability to pay money on a contingency within sect. 178. The covenant is to keep up the insurance by payments to a third party; not to pay money to the plaintiff at all. The claim of the plaintiff on this breach of covenant would sound only in damages: but these are not necessarily of any particular amount; they might be anything from a farthing upwards. If the plaintiff had paid the premiums on the policy and the defendant had repaid him, then the damages on the first breach might be a farthing. You really may put the possibility fifty ways. This point was before the Court of Exchequer in *National Assurance Association v. Best*, 2 H. & N. 605.† There, by way of security for a loan, a policy of assurance was charged with payment of principal and interest, and *929] the *borrower covenanted to pay the premiums. He failed to do so; whereby the policy, from its terms, became forfeited. An action being brought on this covenant, and no proof of actual damages given, the Court held that there could be only nominal damages. Pollock, C. B., delivering the judgment of the Court, said: "It is clear that the amount of the premiums is not the criterion of damage. The premiums not having been paid by the covenantors, if the covenantees had paid them in order to keep up the policy, or, for their own security, had effected another policy, there might have been ground for substantial damages; but here there was nothing but the loss of the security, and it does not appear that any actual injury was sustained by the plaintiffs in consequence of that. The plaintiffs have not put us, nor did they put the jury, in a situation to estimate what damages they are entitled to, if the amount of the premiums does not furnish the criterion. As the Court cannot substitute any other measure of damage, we think that on the first count the plaintiffs are entitled to nominal damages only." I think, therefore, that the defence as to the first breach is not sustained. I had little difficulty, in my own mind, as to the second breach; for I thought that still less a case of liability to pay money on a contingency.

BYLES, J.—I agree that there is no defence as to the first breach. I am led to this opinion chiefly by the authorities.

Judgment affirmed.(a)

(a) See *Parker v. Ince*, 4 H. & N. 53.†

See *Boyd v. Robins*, 4 C. B. N. S. 749; in error, 5 C. B. N. S. 597, and notes, and see *White v. Cobbett*, post, "Additional Cases."

*IN THE EXCHEQUER CHAMBER. [*930

HIGGINS v. SEED. *June 16.*

THIS case, decided on appeal from the Court of Queen's Bench, is reported, 8 E. & B. 771 (E. C. L. R. vol. 92).

RICHARD OGLESBY and JOHN ALLEN, Appellants, v. JOSE RAMON YGLESIAS, Respondent. *June 17.*

A memorandum for a charter-party, made between plaintiffs, shipowners, and defendant, "as agent for the freighter" (no principal being named), after providing for "demurrage over and above the said lying days at 7*l.* per day," stated that "it is further agreed that, this charter being concluded by" defendant "for another party the liability of the former in every respect, and as to all matters and things, as well before as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo."

Held that the defendant was not liable, upon this memorandum, for demurrage at the port of discharge.

THIS was an appeal from the decision of the judge of the Sheriffs' Court, London, under The London (City) Small Debts Extension Act, 1852,^(a) s. 78.

The plaint in that Court was entered by the appellants to recover from the respondent 49*l.* for demurrage upon a charter-party. The material facts of the case, stated by the judge, were as follows.

The appellants are owners of the barque Lowick, Oglesby residing at Hull, and Allen at South Shields. The respondent is a merchant in London. The said barque was chartered for a voyage from the river Tyne to Alicante, by and under a charter-party, which ran as follows :

"Memorandum for charter.

"Newcastle on Tyne, 11th October, 1856

"It is this day mutually agreed between Mr. Richard *Oglesby owner of the British or privileged ship or vessel called The Lowick, —, master, of the burthen," &c., "now in the Tyne, and J. R. Yglesias, Esq., of London, as agent for the freighter, that the said ship, being tight," &c., "shall, with all possible speed, proceed to" a place in the river Tyne, and there load a cargo of coals, "and, being so loaded, shall therewith proceed to Alicante, safe place of anchorage and moorage as the consignee may direct, and deliver the same to the said freighter or his assigns, on being paid freight at and after the rate of," &c., "one working day per keel and half to be allowed the said freighter (if the ship is not sooner despatched) for delivery of the cargo, to commence when the ship is in a proper berth and ready to discharge:" "demurrage over and above the said lying days at 7*l.* per day." "It is further agreed that, this charter being concluded by J. R. Yglesias for another party, the liability of the former in every respect, and as to

(a) 15 & 16 Vict. c. lxxvii., local and personal, public. Printed at length in the Statutes at Large.

all matters and things, as well before as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo.

"For J. R. Yglesias,

"Witness, J. Masterton."

ADOLPHUS P. HARRISON & Co.,
"Agents."

The vessel shipped, in the river Tyne, a full cargo of coals, consigned to a person at Alicante, known to the shipowners as being the consignee, and named as consignee in the shipping note, which stated the coals to be "shipped" "by J. R. Yglesias, of London," "to be delivered" to such consignee.

The vessel arrived at Alicante on 27th November, 1856, and was ready to discharge on the 1st December, of which notice was given the same day to the consignee. The receipt of the cargo was acknowledged *932] by the consignee, *who paid the freight. The discharge commenced on 2d December, 1856, and was not completed till 9th January, 1857. Application was made to the consignee for the amount due on account of demurrage; but nothing was paid by her.

The objection taken on behalf of the respondent was that he was not personally liable on the charter-party, inasmuch as he was merely an agent for the consignee; and that the captain and owners must have known that such was the case: and also that the last clause of the charter-party relieved him from any liability. The judge decided that in law the respondent was not personally liable on the charter-party, or for the demand sued for, and gave a verdict for him.

There was no evidence of any principal having been named, or having existed, other than the consignee.

Davison, for the appellants.—The respondent, Yglesias, is the only person liable for the demurrage. The charter-party is signed on his behalf, by his agents, who thereby hold him out as principal: the clause, therefore, which professes to relieve him of liability as principal, is repugnant, and must be rejected in construing the instrument. The intention of the parties, as to whether or not the party signing is to be treated as personally liable, must be collected from the whole document: *Green v. Kopke*, 18 Com. B. 549 (E. C. L. R. vol. 86); *Cooke v. Wilson*, 1 Com. B. N. S. 153 (E. C. L. R. vol. 87); (a) *Lennard v. Robinson*, 5 E. & B. 125 (E. C. L. R. vol. 85). [CROMPTON, J.—In those cases there was no *express* disclaimer of personal liability by the party signing, as there is here. The question here is, is such express disclaimer, alleging *933] a limited liability upon the contract, good at law as a *defence to a claim founded upon the ordinary liability upon a contract of that description?] That disclaimer is repugnant to the effect of the preceding contract, which is complete in itself, and creates a personal liability: the disclaimer must therefore be considered as void, on the principle adopted in *Furnivall v. Coombes*, 5 M. & G. 736 (E. C. L. R. vol. 44). The only person liable at all, upon the face of the instrument, is Yglesias. The consignee of the cargo is a stranger to the charterer until the shipping note is handed over. [CROMPTON, J.—Suppose the proviso had contained the express words "for an unknown consignee." In that case the plaintiff would probably not have entered into the contract at all. [CROMPTON, J., mentioned *Pederson v. Lotinga*, 28 Law

(a) See *Parker v. Winlow*, 7 E. & B. 942 (E. C. L. R. vol. 90).

Times 267.(a)] The decision there was only on the demurrage prior to the shipment, as to which the defendant was held liable; and, even as to demurrage at the port of discharge, the clause exempting the defendant from liability was much stronger than here, the owners and master agreeing to rest solely upon their lien. [CROMPTON, J.—In *Pederson v. Lotinga*, as in this case, the person entering into the charter-party was liable to a limited extent. Here the liability attaches upon his not loading in a given time.] The very fact of the proviso shows that he was primarily liable for more: and that primary liability must still continue, if the exempting clause is clearly repugnant to the *intention on the face of the instrument. *Schmaltz v. Avery*, 16 Q. B. [*934 655 (E. C. L. R. vol. 71), is an authority in favour of the plaintiff.

F. M. White, *contrà*, was not called upon to argue for the respondent. (WIGHTMAN, J., was absent.)

ERLE, J.—The judgment must be affirmed. I agree that Yglesias is the contracting party: but the question still remains, what is the contract into which he enters? The charter-party contains an express and unequivocal stipulation that his liability, “in every respect, and as to all matters and things, as well before as after the shipping of the said cargo, shall cease as soon as” the cargo is shipped. It may seem improbable that the owner would leave himself without a remedy at the port of discharge: still, if he chooses so to contract, it is not our office to interfere. It is impossible to construe the charter-party otherwise than as exempting the defendant from all liability after shipment of the cargo.

CROMPTON, J.—I have never had any doubt upon this point. No doubt, as Mr. *Davison* has contended, Yglesias is the contracting party: but it was competent for him, if he chose, to make it a part of the contract that he should be exempt from all liability after the cargo was shipped. That is clear as a matter of law; and in *Pederson v. Lotinga*, 28 Law Times 267, that principle seems to have been assumed. In that case some of the Judges of this Court said that the only doubt was as to what the intention of the defendant was: no doubt was expressed that, if he intended so to contract, it was competent to *him to do so. [*935 There is nothing absurd or repugnant in this clause, looking at the usual course of the coal trade. I do not say that the plaintiff has no remedy: it is possible that the party for whom the defendant is agent might be liable, although there would, in that case, be this difficulty, that two persons would be liable upon the same contract, one as principal, the other as agent. At all events the parties contracting were perfectly at liberty to introduce this stipulation; and there can be no doubt as to its meaning.

ERLE, J.—My brother Hill (b) has desired me to say that, as far as he has heard the argument, he concurs in the view which we have taken.

Judgment affirmed.

(a) January 27, 1857; before Lord Campbell, C. J., Coleridge, Wightman, and Crompton, J_s. According to the note of Messrs. Ellis and Blackburn, no question arose as to the liability to demurrage at the port of discharge. The learned Judges pointed out the peculiar language of the particular instrument, according to which the provision as to demurrage at the port of loading was different from that as to demurrage at the port of discharge.

(b) Hill, J., had left the Court during the argument.

IN THE EXCHEQUER CHAMBER.

WATSON v. McLEAN. *June 17.*

THIS case, decided on appeal from the Court of Queen's Bench, is reported, *antè*, p. 78.

SANDON v. JERVIS and DAIN. *June 17.*

A sheriff's officer, in execution of a *ca. sa.*, put his hand into the debtor's dwelling-house, by an opening in a window caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor who was inside the house, and said, "You are my prisoner." He was unable then to secure the person of the debtor; but he thereupon broke open the outer door of the house, and seized the debtor.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the officer had acted legally, the arrest having been effected by touching the debtor, and the subsequent breaking of the outer door being justifiable for the purpose of taking into custody the debtor so arrested.

ACTION for assault and false imprisonment, in arresting the plaintiff and detaining him in custody. *Defendants severally pleaded:
 *936] 1. Not guilty; 2. Justification of the arrest and detention under a writ of *ca. sa.* against the plaintiff. Replication to plea 2: That defendants illegally arrested and took the plaintiff, by illegally breaking the window of plaintiff's dwelling-house, and by breaking and entering the outer door of the said dwelling-house, in which plaintiff was when the defendants took him into custody. Issue thereon.

On the trial, before Watson, B., at the last assizes for Staffordshire, the evidence was, that one Burleigh had recovered judgment in an action of debt against the plaintiff, and had issued a writ of *ca. sa.*, and left it with the officers of the defendant Jervis, who was high sheriff for the county of Stafford, for execution. The warrant was intrusted to the defendant Dain; and he tried, on several occasions, to obtain access to the plaintiff's house to arrest the plaintiff, but without success. On 28th August, Dain, accompanied by a follower named Woolrych, was watching the plaintiff's house, for the purpose of arresting the plaintiff, when they observed a window open in an upper story at the front of the house. Woolrych, by Dain's directions, got a ladder, and placed it against the house, intending to enter the house by the open window. The plaintiff's daughter, who was in the house, ran to the window and tried to close it. Woolrych had got one of his hands upon and partly inside the ledge of the window, and tried to keep it open; but the plaintiff's daughter succeeded in closing and fastening the window. The plaintiff also went to the window to assist his daughter; and Woolrych, seeing him near the window, thrust his arm through a broken pane of glass, and touched the plaintiff, saying "You are my prisoner." There was conflicting
 *937] evidence as to the breaking of *the pane of glass, and the position of the plaintiff's arm. The plaintiff's witnesses stated that Woolrych broke the pane of glass, and put his hand through, and so touched the plaintiff; but this was denied by the defendants' witnesses, who said that the plaintiff broke the pane and thrust his hand through to push Woolrych from the ladder. Having touched the plaintiff, Woolrych

came down from the ladder, and, by Dain's direction, broke the outer door of the plaintiff's house and entered it, when Dain arrested the plaintiff, and conveyed him to Stafford gaol, where he had remained ever since, under the writ of ca. sa.

The learned Baron left four questions to the jury.

1. Was the window closed and fastened at the time Woolrych put his hand through and touched the plaintiff? The jury found that it was.

2. Did Woolrych put his hand through the broken pane? The jury found that Woolrych did put his hand through the broken pane.

3. Did Woolrych break the window? The jury found No; and that the window was broken in the scuffle.

4. Did the plaintiff put his hand through the broken pane? The jury found that he did not.

The jury then returned a verdict for the plaintiff, with 5*l.* 5*s.* damages: and the learned Judge gave the defendants' counsel leave to move to enter a verdict for the defendants.

Pigott, Serjt., in last Easter Term, obtained a rule *Nisi* accordingly.

Huddleston and *J. J. Powell* now showed cause.—The arrest was not sufficient. In the first place, though the cases establish that there may be an arrest by touch, *that arrest must be accompanied by circumstances which, in the absence of active resistance on the part of the debtor, would enable the capture to be completed. In *Les Termes de la Ley* "Arrest" is described to be "when one is taken and restrained from his liberty." An arrest by mere touch, therefore, is good only when the restraint, of which the touch is merely symbolical, can be completed. In *Nicholl v. Darley*, 2 Y. & J. 399,† where an officer caught the debtor round the waist, and the debtor broke away and escaped, the Court held that an arrest is complete if the officer has the debtor in actual custody, though but for a moment: that is, as put by Garrow, B., "in such a situation as would enable the officer with proper force and assistance to detain him." Here the officer could not have done so. [CROMPTON, J.—Not through the broken pane; but he could, and did, follow the debtor into the house. Was not the arrest completed then?] That depends upon the next point contended for by the plaintiff, viz., that the officer had no right either to put his hand through the broken pane of glass, or to break open the outer door afterwards. The privilege of a dwelling-house is elaborately explained by Lord Mansfield, in *Lee v. Gansel*, 1 Cowp. 1. It is there laid down that the outer door of the house cannot be broken. [CROMPTON, J.—The privilege ceases as soon as there has been an arrest.] There had been no proper arrest here. The officer, in putting his hand through the broken pane to touch the plaintiff, violated the privilege of the dwelling-house, so that the touching was no arrest; and, that being so, he acquired no right to break open the outer door, and was guilty of a second violation of the privilege of the house in doing so. [CROMPTON, J.—The officer may arrest *through an open window; may he not do so through a pane which has been broken, but not by him? ERLE, J.—Just as he might arrest through a window which was ineffectually closed?] Where the window is open, or ineffectually closed, the owner has given up the privilege of his house; but not where the glass is accidentally broken. [CROMPTON, J.—If a man is arrested outside his house, and runs inside it and locks himself in, that is an arrest which would justify

the officer in breaking in.] There the debtor would have been properly arrested in the first instance: here he was not. It was, no doubt, agreed in *Genner v. Sparks*, 6 Mod. 173, S. C. 1 Salk. 79, that, "if a bailiff have a warrant against a person who is in a house, and lay hand upon him through the window, he may afterwards break the house to come to him." But that decision appears to be based upon Sir William Fish's Case, cited in *White v. Wiltshire*, 2 Roll. R. 138, S. C. Palm. 53;(a) and there the debtor himself opened the window; so that the arrest was a proper one. And the dictum of Holt, J., in an Anonymous Case, 7 Mod. 8, that, "if a window be open, and a bailiff put his hand and touch one for whom he has a warrant, he is thereby his prisoner, and may break open the door to come at him," is based, as appears by the reference, upon *Genner v. Sparks*.

Pigott, Serjt., and *Scotland*, contra, were not called on.

(WIGHTMAN, J., was absent.)

*940] ERLE, J.—This rule must be made absolute.—The *question is, whether the plaintiff was properly arrested; or, in other words, what constitutes an arrest. It appears to me to be decided by the authorities that, if the officer can touch the party against whom he has a warrant, without breaking into the dwelling-house in so doing, that is a sufficient arrest. Now here, though the window was broken, it was not broken by the officer; and he touched the plaintiff who was within his reach, without committing any violation of the privilege attaching to the dwelling-house. It has been argued that, in order to make an arrest by touch sufficient, the officer must have, at the time, the power of keeping the party so arrested under restraint. I think that it would be most pernicious if the question, whether the officer had such means of restraint, were perpetually to be submitted to a jury. Take the case, put by my brother Crompton, of the party arrested running into his house and locking himself in there. It would be a difficult and dangerous question to leave to the jury, whether, under these circumstances, the officer had the power of restraining him at the time of arrest. The Anonymous Case in 7 Mod. 8, seems to me to decide that mere touch by the officer, through a window already open, is sufficient, without such power of restraint as has been contended for. And in *Genner v. Sparks*, 6 Mod. 173, S. C. 1 Salk. 79, it was agreed by the Court that a touch by the officer "even with the end of his finger" is sufficient. The Judges seem to have put the breaking into the dwelling-house as the boundary of what is a lawful arrest: any personal contact with the debtor by any means short of such breaking in is good; *941] and an arrest is therefore sufficient if made through a window *which has either been left open, or, as here, has been accidentally broken, but not by the officer.

CROMPTON, J.—I also think that the arrest was good. The argument that the officer must, at the time of touching the debtor, possess the ability of retaining him in custody, is not supported by the authorities. *Genner v. Sparks*, 6 Mod. 173, S. C. 1 Salk. 79, and the Anonymous (b) case in 7 Mod. show that mere touch, if unaccompanied by any infraction of the dwelling-house, is a sufficient arrest, and gives the officer the right to break into the house to complete the capture. I felt more

(a) See *Pugh v. Griffith*, 7 A. & E. 827 (E. C. L. R. vol. 34).

(b) 7 Mod. 8.

pressed by the second point, viz., that here there was an illegal infraction of the dwelling-house, by the officer putting his hand through the pane, on the same principle as, in criminal cases, a putting in of the hand where the window had been left open has been held to be a step in a constructive breaking into the house. But, under all the circumstances, I agree with my brother Erle that we may keep to the question whether, there having been, at all events, no actual breaking in, there was such a touch as constitutes an arrest; and I think that there was.

HILL, J.—The first question is, what is a sufficient touch to constitute an arrest. It has been contended that the officer must have, at the time of touching, the ability of taking corporal possession of the debtor, or, at least, of keeping him under restraint. But that position is certainly not sanctioned by the authorities cited in the course of the argument; and Blackstone, in his Commentaries,^(a) lays down that “an arrest must be by corporal seizing or touching the defendant’s body; after *which the bailiff may justify breaking open the house in which [*942 he is, to take him.” It was also argued that the officer, by putting his hand through the broken pane, had violated the privilege of the house. But the pane was not broken by him; and I think that the officer, touching the plaintiff through the pane, had as much right to make the arrest through the pane as he would have had to go at once into the house and make the arrest if the door had been left open by the owner, or even broken by third parties and then left open. Then, the arrest having been lawfully made, the officer had a right to break open the outer door of the house and complete the capture. On both points, therefore, I agree with the rest of the Court that this rule should be made absolute.

Rule absolute.

(a) 3 Bl. Com. 288.

IN THE EXCHEQUER CHAMBER.

SANDON *v.* JERVIS and DAIN. [*Feb.* 4, 1859.]

[For syllabus, see *antè*, p. 935.]

THE plaintiff having appealed to the Exchequer Chamber,
In this vacation,^(a)

J. J. Powell was heard for the appellant (plaintiff below).—First, there was no legal arrest before the breaking of the house door, because the officer had not, till then, corporal possession of the plaintiff: Secondly, even if there was such corporal possession, it was illegally obtained, and the defence fails. As to *the first point, all the definitions, and [*943 almost all the authorities, concur in the proposition that merely touching the body of the debtor does not constitute an arrest, except in the cases where the touch is only symbolical. It is not indeed necessary that there should be such a possession of the body that the officer is able to carry the party to gaol: that may be rendered impossible by the superior strength of the debtor. But there must be such a strong hold that the debtor cannot escape without exerting strength. In *Tomlin-*

(a) February 2.

son's Law Dictionary, "Arrest" is defined as "a restraint of a man's person, obliging him to be obedient to the law," and as "the beginning of imprisonment;" which agrees with the definition in *Les Termes de la Ley*, cited below. The sheriff cannot be liable for an escape where no more has taken place than a touch; yet that would follow if the point contended for on the other side were valid: *Nicholl v. Darley*, 2 Y. & J. 399.† In *Sir William Fish's Case* (a) it was held that, where a debtor opened the casement of the window of his house and took the sheriff by the hand, and the sheriff then arrested him, the arrest was legal, so that, the debtor having pulled away his hand, the sheriff might afterwards break open the door of the house and take him. But it must be assumed that there the sheriff took the debtor's hand, a very different thing from mere touch. In *Genner v. Sparks*, 6 Mod. 173, S. C. 1 Salk. 79, it was agreed that, if the sheriff "had but touched the defendant even with the end of his finger, it had been an arrest." But that must have been spoken with reference to the particular case before the Court, where the defendant was in a yard and could not get away, so that the touch would *944] have been merely symbolical. It is true that there follows an illustration, "as if a bailiff have a warrant against a person who is in a house, and lay hands upon him through the window, he may afterwards break the house to come to him." That, however, is merely founded on *Sir William Fish's Case*, (a) which has been already explained. The same remark applies to the *Anonymous* (b) case in 7 Mod. The dictum in *Bul. N. P. 62*, rests merely on those in *Genner v. Sparks*, 6 Mod. 173, S. C. 1 Salk. 79. [WILLES, J., referred to *Com. Dig. Execution* (C 12). BRAMWELL, B.—To recur to the test which you suggest: suppose the officer put his arm through the iron railings of a gate which he cannot pass, and lays hold of the debtor, is that an arrest?] That seems to be an arrest, because the debtor, being actually detained, is bound to submit to the law. Secondly, the capture was at any rate obtained by an illegal entry. The circumstances in *Doe v. Trye*, 5 New Ca. 573 (E. C. L. R. vol. 35), were something like those in the present case: the officer thrust his hand through some paper which supplied the place of a pane of glass in the window; and he thus got the key of the house, with which he opened the door and effected the capture in the house: and this was admitted to be an illegal arrest. [WILLES, J.—The key was obtained by a trespass. BRAMWELL, B.—Might the officer get in through an open window?] Supposing that to be lawful in the case where a window has been negligently left open, the present case is very different: the window was broken in the defence of the legal possession of the house. In *Park v. Percival*, Hob. 62 (5th ed.), an arrest was held to be illegal, where the officer obtained an entry into a house *945] by craft, in calling to the *wife of the owner, who opened the door a little, whereupon the officer rushed forcibly in. The debtor has the right to keep the door of his own house shut: *Semayne's Case*, 5 R. p. 91a, 93 a. [BRAMWELL, B.—I always thought the officer might get into the house by any means not forcible. In *Park v. Percival*, Hob. 62 (5th ed.), the house was not the house of the debtor.] He lay there; and it appears from *Semayne's Case* that, even in such a case, the officer cannot

(a) Cited in *White v. Wiltshire*, 2 Rol. R. 138; S. C. Palm. 53.

(b) 7 Mod. 8.

break into a house without a previous request and denial. In Comyns's Digest, *Execution* (C 5), it is said that the sheriff, under an execution against the goods, cannot open the outer door, though it be only latched. [CROWDER, J.—That doctrine of Comyns seems to be questioned by the Court of Exchequer in *Ryan v. Shilcock*, 7 Exch. 72.† WILLIAMS, J.—In *Curtis v. Hubbard*, 1 Hill's New York Rep. 337, cited in Smith's note (a) to Semayne's Case, the law is asserted as in Comyns.] Lord Mansfield's language in *Lee v. Gansel*, 1 Cowp. 1, has been already referred to in the argument below. The proper rule seems to be that, where a door or window is left open by intention or negligence, there the officer may enter; but not otherwise. Thus, if a window were broken by a hail-storm, or a door blown down by a gust of wind, there, unless a reasonable time for repairing had elapsed, the officer could not enter. In *Aga Kurboolie Mahomed v. The Queen*, 4 Moore's P. C. C. 239, a case before the Privy Council, it was held that an officer, who, in execution of a bailable writ, had peaceably entered a house, but had been forcibly expelled before making an arrest, might, without demanding re-entry, lawfully break open the *outer door of the house which had been fastened against him. There the debtor could [*946 not avail himself of the unlawful expulsion; and the officer was entitled to replace himself in the position from which he had been illegally disturbed. The decision therefore is not an authority in the present case: but Lord Campbell's judgment there will be found to accord with the general principle now insisted upon.

Pigott, Serjt., for the respondents (defendants below), cited an Anonymous (b) case in Ventris.

PER CURIAM.—We will consider whether it is necessary to hear you.

And now the learned Judges, without calling on *Pigott*, Serjt., pronounced their judgments.

POLLOCK, C. B.—We think that the judgment of the Court below ought to be affirmed, as we are all of opinion that the defendants were justified in what they did. It does not appear to me that the question involves any general principle. It is a matter of positive law whether a mere touch is to constitute an arrest or not. It might have been reasonably prescribed either that it should or should not be necessary to an arrest that there should be a possession of the person. But probably the reason which led to the laying down of the law as it stands was that it was thought desirable to avoid unnecessary violence; and therefore it was determined that, if the officer was near enough to the debtor to touch him, it was the duty of the debtor to submit; and this for the purpose of preventing conflict. I may remark parenthetically *that what the law of England most aims at is the preservation of peace. It [*947 will not allow a man to take forcible possession of even his own property. But, whatever be the reason, the law is that, if the officer is near enough to the debtor to touch him, and does touch him, and gives him notice of the writ, it is an arrest. I can well understand the reason for its being so held. There may be an apparent incongruity when the contact takes place under circumstances which preclude the possibility of an actual seizure, like the case of a wall intervening, as between *Pyramus* and *Thisbe*, but with the possibility, not merely of a whisper,

(a) 1 Smith's L. Ca. 82 (4th ed.).

(b) 1 Vent. 306.

but of a touch. Where, however, the debtor is actually in a house which is watched, so that he cannot get away, there is no absurdity in saying that a touch shall constitute an arrest. What then is there in the present case to defeat the justification? It is admitted that, if the officer finds the house door open and gets into the house, he may by doing so effect the arrest. If, then, the door be so far open, or there be a window so broken, as to admit of the officer touching the debtor, the officer may effect the arrest by so touching.

WILLIAMS, J.—I am quite of the same opinion. Putting all the facts of the case together, there was a lawful arrest. It is perfectly clear that it has always been assumed that touching the person constitutes an arrest. Then the question is, only, whether here it was illegal to touch the person. The aperture in the window enabled the officer to do so: he had a right to avail himself of the window being in part open.

CROWDER, J.—I am of the same opinion. It is laid down by Holt, C. J., and the other Judges, in *Genner v. Sparks*, 6 Mod. 173, *948] S. C. 1 Salk. 79, that a mere touch constitutes an arrest, though the party be not actually taken. Then, was the act itself legal? The pane of glass was not broken by the officer who arrested; nor did he enlarge it; he only put his hand in.

WILLES, J.—I am of the same opinion. The opinion pronounced by Holt, C. J., and the other Judges in *Genner v. Sparks*, 6 Mod. 173, S. C. 1 Salk. 79, is quite sufficient to decide this case. The 6th volume of *Modern Reports*, in which that is found, is a book of authority.

BRAMWELL, B.—I am of the same opinion: but I wish to guard myself against being supposed to lay it down that the sheriff would be liable to an escape where the officer had been unable to do more than touch the debtor. The capture might be good as against the debtor so as to preclude him from saying that he had not been arrested, and yet not complete so as to make the sheriff liable for an escape. But, according to my view, the case of *Aga Kurboolie Mahomed v. The Queen*, 4 Moore's P. C. C. 239, is a decisive authority to show that the officer was here justified in breaking open the outer door after he had touched the debtor; for I cannot distinguish between a right to enter after having been thrust out, and a right to enter for the purpose of taking a party already arrested. It may possibly be that, in some sense, the arrest could not be completed till the officer had that corporeal control which Mr. *Powell* maintains to be essential; I wish not to be understood as asserting that the sheriff would have been liable for an escape if the debtor had got away after he had merely been touched.

Judgment affirmed.

An officer in execution of civil process, cannot break down the outer door of a dwelling-house, in order to arrest the owner of the house or even a permanent boarder: *Oystead v. Shed*, 13 Mass. 520; *Ilseley v. Nichols*, 12 Pick. 270. But if the outer door be open, he may enter and break open an inner door: *Hubbard v. Mack*, 17 Johns. 127; *Williams v. Spencer*, 5 Johns. 352; though the rest of the house be let to strangers: *Williams v. Spencer*, ut supra. And he may enter by a back door, if that be generally used by the family, though the front door be fastened: *Hubbard v. Mack*, ut supra. Where an arrest has been once made, and the prisoner escapes

to his house, the officer may then, in the defendant submits to the officer's immediate pursuit, follow and break authority, though there be no actual down the outer door: *Allen v. Martin*, touching of the body: *Jones v. Jones*, 10 Wend. 300. 13 Ired. 448; *Field v. Ireland*, 21 Alab.

An arrest will be complete where 240; *Courley v. Dozin*, 20 Geo. 369.

*The QUEEN v. SIR JOHN WILLIAM RAMSDEN, Bart. [*949
July 3.

The liability to repair a highway *ratione clausuræ* is in the occupier of the lands enclosed; not in the owner, as owner.

Per Erie, J., and *semble*, per Crompton, J., such liability does not accrue where either the highway is not immemorial, or where the adjoining land enclosed has not, before the enclosure, been used for passage.

INDICTMENT for non-repair of a road. The second count charged that, "from the time whereof the memory of man is not to the contrary, there was and yet is a certain common and ancient Queen's highway," called, &c., "situate in the parish of Huddersfield," "used by and for all the liege subjects of our said Lady the Queen and her predecessors, with their horses, coaches, carts, and other carriages, to go, return, pass, and repass," &c., "at their free will and pleasure:" that 800 yards of the said highway (specifying the part) was very ruinous, &c., and in great decay for want of due reparation and amendment, so that the liege subjects, &c., could not go, return, pass, and repass, &c., as they ought and were wont and accustomed to do, without danger and damage: that the defendant, "being the owner of certain lands in the parish aforesaid, lying and being on both the north and south sides, and running along the sides of and adjoining the said last-mentioned Queen's common highway, by reason of his having, before," &c., "wholly enclosed and fenced off his land adjoining and running parallel" with the said highway, on the north side, and along that part which was out of repair, "and having, before," &c., "on the south side of the said last-mentioned Queen's highway, enclosed and fenced off his land adjoining and running parallel with the same" to the extent of 400 yards of the part which was out of repair ("the remaining 400 yards" out of repair on the south *side "adjoining on a deep precipice, forming a natural barrier from the land" of the defendant "on that side"), "and, to that extent and thereby, having prevented Her Majesty's liege subjects, with their horses, coaches," &c., "from going, returning," &c., "through and along the lands adjacent to" the said highway, "while they were so as last aforesaid foundrous and out of repair," &c., "and by continuing to keep" the said lands so adjoining enclosed, "ought to repair and amend that part" of the said highway "when and so often as there shall be occasion:" and that the defendant had not done so. [*950

Plea. Not guilty.

The first count, which charged the defendant with liability to repair "by reason of his tenure of certain lands and tenements" in the said parish, on both sides of the said highway, was abandoned at the trial.

On the trial, before Martin, B., at the last Spring Assizes for York-

shire, it appeared that the road in question was not an immemorial highway, as averred in the indictment: but that, in 1789, by the Huddersfield Enclosure Award, the land on each side of the road (described in the award as a public road) was allotted to Sir John Ramsden, the defendant's ancestor. The Enclosure Act under which the award was made, and in which the road was set out, authorized persons to whom land should be allotted to enclose such land. The land on each side of the road was accordingly enclosed and built upon, and was, before and at the time of the indictment, occupied by tenants of the defendant, the present owner of the land. The dedication of the road was admitted. Evidence was given that in the course of 185 yards of the 800 indicted it would have been possible for carts to break out of the road and pass over the land adjoining, but on the north side only. No *951] enclosure had been *made to the extent of the 185 yards till fifteen or twenty years ago. The jury, in answer to a question put to them by the learned Judge, found that there was not, substantially and beneficially, any enjoyment, by the public, of the right of using the land at the side of the road, when the road was out of repair.

The learned Judge directed a verdict for the defendant, with leave to the prosecutor to move to enter a verdict for the Crown on the said second count as to 185 yards of the highway.

Hugh Hill, in last Easter Term, obtained a rule *Nisi* accordingly, "on the ground that the facts proved and admitted at the trial proved the liability to repair as to that extent of the highway."

In this Vacation, (a)

Atherton and *Cleasby* showed cause. *Pashley* and *Malcolm* were heard in support of the rule.—The following authorities were cited in the course of the argument: *Com. Dig. Chimin* (A. 4); *Rex v. Stoughton*, 2 Saund. 157; *Sir Edward Duncomb's Case*, Cro. Car. 366, S. C. 1 Roll. Abr. 390, 10, *Chimin Common* (A) 1; *Regina v. Turweston*, 16 Q. B. 109 (E. C. L. R. vol. 71); 4 Bac. Ab. 225 (7th ed.), *Highways* (E.); 1 *Russell on Crimes*, p. 358 (3d ed.); *Rex v. Flecknow*, 1 Burr. 461; *Hawkins's Pleas of the Crown*, Book I. c. 76, s. 6 (vol. 2, p. 155, 7th ed.); *Chitty's Criminal Law*, vol. III. p. 567 a; *Taylor v. Whitehead*, 2 Doug. 745; *Rex v. Sutton*, 3 A. & E. 597 (E. C. L. R. vol. 30); *Regina v. The Tithing of Westmark*, 2 Moo. & R. 305; *Rex v. Giles, Cambridge*, 5 M. & S. 260; *Wellbeloved On the Law of Highways*, p. 90.

*952] *The nature of the arguments appears sufficiently from the judgment. *Cur. adv. vult.*

The learned Judges now delivered judgment seriatim, as follows.

ERLE, J.—This indictment is for non-repair of an immemorial highway, charging the defendant to be liable by reason of enclosure of adjoining land of which he is the owner. The evidence was that the way in question was dedicated within time of memory, and was not immemorial; that the defendant was not the occupier of the enclosed adjoining land. That for 180 yards out of the 800 which were indicted it was possible for carts to break out on one side; but there was no evidence that this adjoining land had been actually so used; and the jury found that there never was, substantially and beneficially, any enjoyment of the right of breaking out over the residue of the line. The

(a) June 14th and 15th. Before Erle and Crompton, J.

verdict was entered for the defendant: and, on a rule to enter it for the Crown, it has been contended that, if adjoining land is enclosed on either side of a highway dedicated within time of memory, the owner of such land, although not the occupier, and although the land so enclosed is not shown to have been ever used for the purpose of passage, is bound to repair the adjoining highway. On the other hand, for the defendant, it was contended that this duty of repair arises only when the land enclosed has been used for passage and become a part of the highway; so that the duty is created by reason of encroachment on the highway, and not by a lawful enclosure: also, that the highway ought to be immemorial: and the party charged ought to be the occupier.

*The authorities cited support the defendant's case. Sir Edward Duncomb's Case, Cro. Car. 366, affords the only instance [*953 of a conviction on this liability which has been cited: and, as all the dicta of Judges and passages in digests and treatises are founded on this case, it ought to be carefully examined. The indictment charged that he had enclosed lands on both sides of an *ancient* highway, whereby he had straitened it, and it had become foundrous, whereas by law he ought to have made it a sufficient way. The evidence showed that the way enclosed was four yards wide: that defendant had made a good causeway for horsemen, yet carts and coaches could not pass nor meet for straitness thereof, nor might go beside the way. It was held that he was bound to repair. We gather, from the abstract of the indictment mentioning an ancient way, that it was charged to be immemorial; and, from the charge that the defendant had straitened it, we gather that he had encroached on land used for passage; and the more so as the evidence showed that carts and carriages could not pass or meet because it was so strait, though it was better for horses than before.

That this view of the effect of the report in Croke is correct appears from the statement of the same case in 1 Roll. Ab. 390, *Chimin Common* (A.): "Si la soit un common chimin pur tous les subjects le Roy et ad estre use temps dont memorie que quant le chimin ad estre foundrous, les subjects le Roy dont use daler per outletts sur le terre prochein adjoynant, le chimyn gisant en le open field nemy enclose, ceux outlets sont parcell de chimyn, car les subjects le Roy doint aver un bon passage, et le bon passage est le chimin, et nemy solement le beaten tracke." "Trin. 10 Car. B. R. per Curiam sur *un tryall al barr sur un information vers Sir Edward Duncombe." See also Ibid. (B): [*954 "Qui doit ceo repaire. 1. Si la soit un common alt chimyn qui ad estre use temps dont memorie, &c., destre repaire per le pais, et puis J. S. que ad terre nemy enclose prochein adjoynant al alt chimyn d'ambideux sides del chimyn, et il pur son singular profit enclose son terre d'ambideux sides le chimyn per hedge & ditch, il per ceo ad emprist enapres sur luy le reparation del chimyn, & ad free le paies del reparation de ceo, issint que il mesme tous temps apres quant serra besoigne doit ceo repaire. Trin. 10 Car. B. R. en un information vers Sir Edward Duncombe resolve per Curiam sur evidence al bar sur tiel information, & n'est sufficient pur luy a faire le chimin tam bon come fuit al temps de son enclosure, mes doit faire ceo un perfect bon chimin sans aiant aucun respect al chimin come fuit al temps del enclosure, & dunque fuit dit que ceo fuit issint resolve per tous les justices 6 Jac. & 19 Jac. car quant le chimin gisoit en le open fields, nemy enclose les subjects le

Roy soloint quant le chimyn fuit male ou founderonz daler, pur lour melior passage, sur les fields adjoynant, hors del common tract del chimin, le quel libertie est toll per l'inclosure." This report states that the way was immemorial, and that the adjoining land had been actually used immemorially for passage before the enclosure. Then follows placitum (B) 2: "Un owner de terre qui n'est l'occupier de ceo, ne poet estre charge a repaier un common chimin, mes solmen le occupier. Hill. 11 Car. B. R. en un Forster's Case," &c. As this placitum follows that relating to liability by reason of enclosure, I think it relates to the same liability, and shows that the present defendant is not liable.

*955] *In *Rex v. Stoughton*, 2 Saund. 157, Stoughton was indicted on the same liability; and the indictment charges that a certain common highway in Stoke, "being from time whereof the memory of man is not to the contrary, a common King's highway," was out of repair, and that defendant ought to repair it by reason of the tenure of certain lands on the west side of the said highway, by him the said defendant enclosed and encroached from the said highway, and continued by him to be enclosed and encroached since, "which said land so as aforesaid enclosed and encroached, for the whole time aforesaid" "was parcel of the said common King's highway." The judgment was for the defendant, on demurrer to his plea on a point now irrelevant; but the precedent is strong to show that the liability was supposed to attach only to immemorial highways, and only in respect of land enclosed which was parcel of the highway: and, as it alleges that the defendant encroached and continued the encroachment, he was probably charged as occupier.

In *Rex v. Flecknow*, 1 Burr. 461, the parish was indicted, and pleaded that Watson, by reason of the tenure of lands enclosed by him, ought to repair; and the prosecutor replied that this land was enclosed under an enclosure Act, and that Watson was allottee of an allotment, and therefore made the enclosure: and it was decided that, as Watson had a lawful right to enclose, he incurred no liability to repair by reason of doing so. The principle of this decision may probably be held to apply to the present defendant; because the evidence here is consistent with the supposition that he or those under whom he claims dedicated so much land as is *used for passage, and no more, and had lawful *956] right to build on the land adjoining, and may have granted the highway for the purpose and with the intention of enclosing it, by building in an adjoining land; which would be lawful, according to daily experience.

These are the only cases cited on the subject. The passage from *Rolle* has been often repeated; but the law is not altered by repetition.

It follows that the present rule for entering the verdict for the Crown should be discharged; in my opinion, on each of the three grounds above mentioned, viz., because the highway is not immemorial, and because the land enclosed is not shown to have been used for passage, and because the defendant is not the occupier of that land.

CROMPTON, J.—I agree with my brother Erle that this rule should be discharged. The defendant is charged with the non-repair of a road, *ratione clausuræ*, in respect of certain land whereof he is owner, but not occupier. There seems to be neither precedent nor authority for charging the owner, not being the occupier, in respect of such liability:

and the only authority from Rolle's Abridgment, which has been stated at length by my brother Erle, is strongly against the mere owner being chargeable. It was said, indeed, by Mr. *Pashley*, that we ought to construe the passage from Rolle's Abridgment as applying to a liability *ratione tenuræ*: but it immediately follows the placitum as to the law in respect to liability *ratione clausuræ*; and it seems particularly applicable to such a liability, which may be put an end to by the person in occupation, who has the possessory right, throwing down the enclosure. I think, also, that *there is strong reason for supposing that the liability *ratione clausuræ* does not arise in a case like the present, [*957 where the origin of the road is by modern dedication, and where, from the circumstances of the origin of the road and the nature of the property, such dedication may reasonably be presumed to have been to the extent of the road only as laid out, excluding any right to go on the land adjoining, which seems to have been intended for the building of houses. It would appear strange to apply the general rule of the liability arising from the enclosure of open fields to the case of a person laying out a street and building houses along it, when the object of opening the street is for the purpose of the houses being built on the side. In such case the way may perhaps be said to be dedicated only so far as that the public are to use the place marked out; and it would seem strange to say that, if that were out of repair, the houses might be pulled down. There was, however, in the present case, no finding as to such limited dedication; and it is sufficient for the decision of this case to say that I do not think that we ought to extend the liability so as to make it apply to the case of owners, where neither the precedents nor authorities apply to the case of owners, but seem confined to that of the occupiers of the lands.

I think, therefore, that the rule should be discharged.

Rule discharged.

***PEEK v. The NORTH STAFFORDSHIRE Railway Company.** July 3. [*958

The agent of plaintiff, by his orders, delivered to defendants, a railway company, some marbles for carriage; and, in answer to inquiries by defendants as to the terms upon which the marbles were to be carried, wrote to defendants, inquiring the "rate of insurance on marble." Afterwards, one W., on behalf of the agent, had an interview with defendants, who informed him of their charges for carrying marbles uninsured and insured, respectively. A printed notice of conditions had been previously sent to the agent by the defendants. One of the conditions was "that the company shall not be responsible for the loss of or injury to any marbles" "unless declared and insured according to their value." W., after the interview, and after the conditions had been sent to the plaintiff's agents, wrote to defendants, signing on behalf of the agents, "Please to forward the three cases of marble, not insured, as directed, to," &c. The marbles were forwarded by defendants, and while on their premises, were damaged, without wilful negligence of defendants. Plaintiff sued defendants, as common carriers, for the damage. Defendants pleaded, among other things: 4, that the marbles were delivered under a special contract, signed by the person delivering them (setting out the contract in the terms of the printed condition), and that they were not declared or insured, &c.; 5, that the marbles were delivered subject to a reasonable condition (setting out the printed condition as before) made by defendants, and assented to by plaintiff, and that they were not declared or insured, &c. The Judge, at the trial, held the condition to be reasonable. Held, by the Court of Q. B. (Lord Campbell, C. J., and Crompton, J., dissentiente Erle, J.),

1. That W.'s letter did not, upon the face of it, amount to a "special contract" to the effect stated in plea 4, within the 4th proviso of sect. 7 of the Railway Traffic and Canal Act, 17 & 18 Vict. c. 31: that oral evidence was not admissible to show that the words "not insured" must have been intended by plaintiff to refer to the printed conditions of the company with respect to uninsured marbles: and that therefore the 4th plea was not proved. 2. That the condition in the 5th plea mentioned could be binding only as a special contract with respect to receiving, forwarding, and delivering goods, and therefore required to be signed, under the 4th proviso in sect. 7, by the owner or the person delivering: that the 5th plea was therefore bad and plaintiff entitled to judgment on it: and, further, that, as there was no binding assent, as alleged, by the plaintiff to such condition, plaintiff was entitled to the verdict on that plea also. Judgment for the plaintiff.

Held, by the Exchequer Chamber (Pollock, C. B., Martin, B., Watson, B., Channell, B., and Willes, J., dissentiente Williams, J.), reversing the judgment of the Court of Q. B. as to the 4th plea (the 5th having been abandoned on argument), that the 4th proviso, as to signed special contracts, in sect. 7 of stat. 17 & 18 Vict. c. 31, referred to contracts of the same kind as those mentioned in sect. 6 of the Carriers Act, 11 G. 4 & 1 W. 4, c. 68.

That the letter of W., signed on behalf of the persons delivering the goods, coupled with the forwarding of the marbles in pursuance of that letter, constituted a sufficient special contract in the form prescribed by the 4th proviso in sect. 7 of stat. 17 & 18 Vict. c. 31.

That that letter might be read with reference to the other correspondence and evidence given at the trial:

And that, so read, or read either by itself, or according to the ordinary understanding of language used between carriers and their customers, or with reference to the general provisions of the Carriers Act, the terms of the contract were those alleged in the plea; and that the 4th plea was therefore proved.

ACTION for negligence. The declaration stated that, the defendants
*959] being common carriers for hire, the *plaintiff delivered to them, as such common carriers, three marble chimney-pieces, to be carried from Stoke upon Trent to London, and that the defendants so negligently carried the same that they were greatly damaged.

Fourth plea: That the goods in the declaration mentioned were delivered to and received by the defendants, to be carried, after the passing of The Railway and Canal Traffic Act, 1854, and under and subject to a certain special contract in that behalf, signed by one George Whittingham for and on account of one Charles Meigh, who was the person delivering the said goods to the defendants for carriage, whereby it was agreed that the defendants should not be responsible for the loss or injury to marbles unless declared and insured according to their value: and that the goods in the declaration mentioned were marbles; and that the same were not, nor was any part of the same, declared or insured by the plaintiff in the manner provided by the said agreement.

Fifth plea: That the said goods were delivered and received, after the passing of the said Act, under and subject to a certain just and reasonable condition, made by the defendants and assented to by the plaintiff, with respect to the receiving, forwarding, and delivering the said goods; that is to say, that the defendants should not nor would be responsible for the loss or injury to marbles unless declared and insured according to their value. That the goods were marbles, and were not, nor was any part thereof, declared or insured according to their value.

Issue on both pleas.(a)

*960] *The case came on for trial before Erle, J., at the Sittings in London after Hilary Term, 1858, when the following evidence was given.

The plaintiff, in July, 1857, was the owner of three marble mantel-

(a) There was also a plea, traversing the bailment as alleged, which was not referred to in the argument in the Q. B. See pp. 987, 990, 996.

pieces in Staffordshire; and a Mr. Meigh, of Hanley in that county, had instructions from him to forward the same to London on his behalf by the defendants' railway. The defendants had a station at Stoke upon Trent, in Staffordshire; and Mr. Meigh was in the habit of delivering goods to the defendants at that station to be carried to London. On the 30th June and 20th July, 1857, printed notices were delivered by the defendants to Mr. Meigh, which commenced as follows.

"The North Staffordshire Railway hereby give notice that they will receive, forward, and deliver goods solely subject to the conditions hereinunder stated." Among the conditions so referred to was the following, which was printed on the same paper under the above notice.

"That the company shall not be responsible for the loss of or injury to any marbles, musical instruments, furniture, toys, or other articles which, from their brittleness, fragility, delicacy, or liability to ignition, are more than ordinarily hazardous, unless declared and insured according to their value."

In the beginning of July, 1857, Mr. Meigh gave directions to a carter of the defendants to call for the marble chimney-pieces, which were then at Mr. Meigh's house, at Streeton, in Staffordshire, and to convey them to the defendants' station at Stoke; and at the same time he desired the carter to inquire at the station what the insurance would be. The carter in consequence went to Mr. Meigh's house, where a Mr. Whittingham, on Mr. Meigh's behalf, had assisted in packing the chimney-pieces. They were then taken by the carter to the company's station at Stoke, and placed in the goods warehouse [*961 of the company. No forwarding note was delivered with the goods; but they were addressed to the plaintiff, "Camden Station, London, to be left till called for."

In pursuance of Mr. Meigh's directions, the carter inquired of Mr. Corden, the defendants' head clerk of the goods station at Stoke, what would be the insurance of the goods, and was told by him that he did not know unless the value of them was stated. The carter communicated this on the following day to Mr. Meigh. A day or two afterwards, Mr. Corden wrote to Mr. Meigh, referring to the goods which had been sent and the message delivered by the carter, stating that the amount of insurance depended on the value of the goods, and requesting to know for what amount the marbles were to be insured. The bearer of this note was told that Mr. Meigh was in Liverpool, and that instructions should be sent. A servant of the company called repeatedly for an answer to this note, but did not obtain any.

On 10th July, 1857, the following note was written and sent to Mr. Corden at the Stoke Station on behalf of Mr. Meigh.

"Old Hall Manufactory, Hanley,
"Staffordshire, 10th July, 1857.

"Mr. Corden. Dear Sir,

"Please inform us, as early as possible, what is your rate of insurance on marble, and we will give you an answer to your inquiries respecting the packages delivered to you on receipt of your reply; and oblige

"Yours truly,

"Rate per cent.

"for C. MEIGH & SON,

"GEO. HARDING."

*962] *On the receipt of this note Mr. Corden went to Mr. Meigh's place of business, and saw his son; and told him that, until the value of the goods was declared, he could not give him the rate of insurance. Mr. Meigh's son stated that he could not tell the value.

On 11th July, 1857, the following letter was written and sent to the defendants at the Stoke Station on behalf of Mr. Meigh.

"Old Hall Manufactory, Hanley,
"Staffordshire, 16th July, 1857.

"Messrs. North Staffordshire Railway Company.

"Gentlemen,

"You will much oblige by sending me the rates of insurance on marbles, as written for last week.

"Yours respectfully,
"ppro C. MEIGH & SON,
"H. HOLLANBY.

"Oblige me by informing me per bearer."

To this letter the goods manager of the defendants at the said station replied as follows.

"Stoke upon Trent, 16th July, 1857.

"Gentlemen,

"I regret that there has been a misunderstanding in reference to the marble which you wish to insure. I desired a clerk to wait upon you for a description of the marble and its value; and I understood that that information would be furnished, and have been waiting to receive it. It is necessary, before fixing the rate of insurance, that we should perfectly understand the nature and the amount of risk that we are about to undertake, and will lose no time in getting the rate of insurance fixed, when you oblige me with this information. I *963] *believe you have already been informed that we cannot insure the marble beyond London.

"I am, gentlemen,
"Yours very respectfully,
"H. T. MILLER."

"To Messrs. C. Meigh & Son, Hanley."

No reply was sent to this letter: and nothing further passed until 28th July, 1857; when Mr. Whittingham, on behalf of Mr. Meigh, called at the Stoke Station and saw Mr. Corden, and inquired why the chimney-pieces had not been forwarded to London. Mr. Corden said Mr. Meigh was perfectly well aware why they had not been forwarded: that he had desired they should be insured, and at the same time did not declare the value: that Mr. Meigh had been repeatedly waited upon and asked to declare the value; and that he did not do so. Mr. Whittingham said the marble was much wanted, and asked Mr. Corden to forward it. Mr. Corden said he could not unless he had written instructions from Mr. Meigh as to whether they should forward it at Mr. Meigh's risk or at the risk of the company, insured or uninsured: that, if the marble was forwarded at the uninsured rate, the company's charge would be 55s. a ton: but, if Mr. Meigh chose to have it insured, it would be ten per cent. on the declared value in addition. Mr. Whittingham said he would see into the matter.

On 1st August, 1857, Mr. Corden received the following note from Mr. Whittingham on behalf of Mr. Meigh.

"Hanley, 1st August, 1857.

"North Staffordshire Railway Company, Stoke.

"Gentlemen,

"Please to forward the three cases of marble, not insured, as directed, to W. Peek, Esq., to be called for at the Camden [*964 Goods Station, London, and oblige

"Yours respectfully,

"C. MEIGH, per G. WHITTINGHAM."

On the same evening the goods were sent by the defendants and invoiced to Mr. Meigh at the rate of 55s. per ton, which was the uninsured rate.

The goods arrived at the goods station at Camden Town on 2d August, 1857; but no person called for them: and, on 5th August, 1857, the following note was sent to the plaintiff.

"London and North Staffordshire Railway Company,

"Camden Station, August, 1857.

"W. Peek, Esq.

"The undermentioned goods, consigned to you from Stoke, arrived here on the 2d: and will thank you to order their removal hence as soon as possible, as they remain here at your risk.

"Your obedient servants,

"PICKFORD & Co., Agents.

Species of Goods.	Marks.	Weight.				Rate.	Paid on.	Carriage.
		T.	C.	Q.	Lbs.			
3 Cases Marbles.		1	"	"	"	557		£2 : 15 : 0

"When you send for the above goods please to send this note.

"Notice. The directors require the carriage to be paid on delivery, unless the consignee has a ledger account with the company."

On 8th August, 1857, the plaintiff sent for the chimney-pieces; when it was found that they had received damage from wet, and that rust from the nails of the packages had soaked through the cases and discoloured the marble.

Evidence was given, on behalf of the plaintiff, that the chimney-pieces were of the value of 70l. each, and that the damage sustained was 52l.

The defendants contended that they were not liable, on the grounds: first, that there was a special contract, signed by the person who delivered the goods to the company for carriage, within sect. 7 of stat. 17 & 18 Vict. c. 31, which sustained the fourth plea; and, secondly, that the goods were received subject to a condition, made by the company and assented to by the plaintiff, that the company should not be responsible for injury to the goods unless the same were insured according to their value, which was not done; that this was a reasonable condition; and that the fifth plea was proved.

The learned Judge held that, taking the facts in evidence into consideration, there was a signed special contract which protected the company from liability, and that the condition stated in the fifth plea was just and reasonable, and that the fourth and fifth pleas were proved: and he directed a verdict to be entered for the defendants on those pleas, reserving leave to move to enter the verdict for the plaintiff for 52*l*.

Hawkins, in last Easter Term, obtained a rule to show cause why the verdict should not be set aside, and a verdict entered for the plaintiff for 52*l*. on the following grounds: "first, that there was no evidence to support the fourth and fifth pleas; second, that the condition mentioned in the fourth (*a*) plea was not a just or reasonable *con-
*966] dition within the meaning of the 17th & 18th Victoria; third, that the said condition appears on the face of the fourth (*a*) plea to be an unjust and unreasonable condition; fourth, that no written or signed contract sufficient to satisfy the said statute was proved; fifth, that the fifth plea does not show any such contract; sixth, that the fourth and fifth pleas are bad on the face thereof: or why judgment should not be entered for the plaintiff, notwithstanding the verdict found for the defendants on the said fourth and fifth pleas."

Phipson, in last Term, (*b*) showed cause.—First, as to the fourth plea. The printed notice given by the defendants to the plaintiff, taken together with the correspondence, constitutes a special contract between the two parties, within the meaning of the statute, limiting the liability of the defendants as common carriers. It is contended, on behalf of the plaintiff, that the contract, if any, is not "signed by" the defendants or by "the person delivering" the goods, as required by stat. 17 & 18 Vict. c. 31, s. 7. But the letter of 1st August, requesting the defendants to forward the marbles "not insured," is signed on behalf of Messrs. Meigh, who had delivered the marbles to the defendants. And the words "not insured" must be taken in connection with the printed notice previously sent to Messrs. Meigh by the defendants. The letter, therefore, amounts to a direction to the defendants to forward the marbles upon the conditions attached by the notice to the forwarding of uninsured goods of that description; that is, at the owner's risk. [CROMPTON, J.—You cannot give a special interpretation to the words "not insured," if the
*967] letter *itself does not show that the words are used with reference to that special interpretation.] It is clear, upon the evidence, that all parties knew that the words "not insured" had that meaning. [COLERIDGE, J.—The letter ought to show, either directly or by reference, that those words were intended to bear that meaning in that particular letter.] The words "not insured" have a latent ambiguity, which may be explained by evidence de hors the written contract. [Lord CAMPBELL, C. J.—Is it a contract at all? The letter has nothing to show that it is connected with any previous documents or correspondence. CROMPTON, J.—You cannot assume, from the mere fact that the parties delivering have received the printed notice, that they intend that their subsequent letter should be construed by reference to that notice.] Evidence is admissible to explain particular words in a written contract, used in a technical sense. [Lord CAMPBELL, C. J.—But you are seeking to introduce oral evidence of a particular incident, in the particular

contract, which varies the clear ordinary meaning of the written words: that is not admissible.]

Next, as to the fifth plea. The plaintiff contends that it ought to have appeared, upon that plea, that the condition there set out was in writing, and signed by the plaintiff or the party delivering the goods for carriage, according to the provisions of section 7. But the fourth proviso relied on applies only to a "special contract" between the company and the owner or the deliverer of the goods carried, and not to the "conditions" mentioned in the first proviso, as to which the only restriction imposed is, that they shall be "just and reasonable." It had been decided by the Courts that, under the old Carriers Act, 11 G. 4 & 1 W. 4, c. 68, the fact *of knowledge by a particular individual, forwarding goods for carriage, of a public notice by the carrier as [*968 to the terms upon which such goods would be carried was evidence of an assent by the owner of the goods to their being carried on a special contract in the terms of such notice: *Wyld v. Pickford*, 8 M. & W. 443;† *Walker v. York and North Midland Railway Company*, 2 E. & B. 750 (E. C. L. R. vol. 75): and that such special contract might be so framed as to protect the carrier, even from liability for loss or injury occasioned by his own default: *Carr v. Lancashire and Yorkshire Railway Company*, 7 Exch. 707;† *Austin v. The Manchester, &c., Railway Company*, 10 Com. B. 454 (E. C. L. R. vol. 70). The object of sect. 7 of stat. 17 & 18 Vict. c. 31 seems to have been, to restrict so wide a power of exemption from liability in the carriers; and the fourth proviso, therefore, makes it necessary that all special contracts protecting the carrier from liability for loss or injury caused by his own default, and which are, *primâ facie*, unreasonable, should be in writing, and signed by the owner or deliverer of the goods; but the first proviso makes no such restriction as to conditions which are reasonable, which obviously do not call for so strict and special a proof of assent on the part of the owner or deliverer. [CROMPTON, J.—Sect. 7 appears to me to declare that conditions may still be made in the nature of a special contract, as they might be under the old Carriers Act, provided that such condition or special contract be reasonable, and provided, also, that it be signed by the owner or deliverer of the goods.] In *Pardington v. South Wales Railway Company*, 1 H. & N. 392,† two of the learned judges, Martin, B., and *Bram- [*969 well, B., appear to have considered that reasonableness was not a necessary element in a special contract signed according to the Act. If that view be correct, the first and fourth provisos of sect. 7 point to different forms of contract between the carrier and the owner of the goods. Again, in *Wise v. Great Western Railway Company*, 1 H. & N. 63,† which was an action against the defendants, as carriers, for negligence in the conveyance of a horse, the Court held a special contract between the parties, exempting, in terms, the defendants from any damage to horses conveyed by the railway, a good defence, and does not appear to have taken into consideration the question whether the contract was reasonable or not. *Simons v. The Great Western Railway Company*, 18 Com. B. 805 (E. C. L. R. vol. 86), and *The London and North Western Railway Company v. Dunham*, 18 Com. B. 826, are, no doubt, to some extent, authorities against the defendants: but all that was taken into consideration in those cases was whether the particular

contract was a reasonable one. *M'Manus v. Lancashire Railway Company*, 2 H. & N. 693,†(a) was only a decision that the contract there in question was reasonable. [CROMPTON, J.—Still, it is clear that in those cases the Court held the question of reasonableness to apply to a special contract under the Act.] Such a construction would be at variance with the last proviso, in sect. 7, “that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under” the old Carriers Act, 11 G. 4 & 1 W. 4, c. 68.

*970] *Hawkins and J. Gordon Allan*, contrâ.—First, as to the fifth plea. The argument on behalf of the defendant comes to this: that there is no necessity for any contract or condition under the Act to be in writing, unless it be unreasonable. The Legislature never could have intended that. At common law, a carrier is bound, on the price for carriage being tendered, to receive and convey the goods, and to take all risks upon himself. The first limitation to that liability was under the old Carriers Act, stat. 11 G. 4 & 1 W. 4, c. 68; sect. 1 of which exempted him from liability only in respect of goods above a certain value, unless he received for conveyance a charge higher than the ordinary one. Then stat. 17 & 18 Vict. c. 31 gives to railway companies who are carriers the means of protecting themselves, by express stipulation, provided that such stipulation be reasonable, from liability in respect of other goods, which, before that Act, they would have been bound, as carriers, to receive and carry at all risks, on tender of the price. But the plain construction of sect. 7 is, that such express stipulation must not only be a reasonable one, but must be signed by the owner or deliverer of the goods, so as to show, upon the face of it, his assent, which, before that enactment, might be inferred from circumstances, as, for instance, from the mere delivery of the goods by the owner with knowledge of the condition imposed by the carrier: *Walker v. York and North Midland Railway Company*, 2 E. & B. 750 (E. C. L. R. vol. 75). In *Pardington v. South Wales Railway Company*, 1 H. & N. 392,† which has been cited as an authority for the defendants, the only point really decided was whether the particular contract was *971] *reasonable or not. *Simons v. The Great Western Railway Company*, 18 Com. B. 805 (E. C. L. R. vol. 86), and *The London and North Western Railway Company v. Dunham*, 18 Com. B. 826, are in favour of the plaintiff. *Jervis, C. J.*, in delivering the judgment of the Court, expressly states that the effect of sect. 7 of the Act is that both “conditions” and “special contracts” must be both reasonable and signed. Further, it might be well contended, notwithstanding the decisions in *M'Manus v. Lancashire Railway Company*, 2 H. & N. 693,†(a) and *Pardington v. South Wales Railway Company*, 1 H. & N. 392,† that the condition here is unreasonable, as absolutely exempting the company from liability arising from any cause whatever.

Next, the fourth plea is not proved. There is no written contract. To make the correspondence, coupled with the printed notice, amount to a contract at all, the ordinary meaning of the words must be varied by verbal evidence, which is not admissible. *Cur. adv. vult.*

(a) In Exch. Judgment of Court of Exchequer reversed in Exchequer Chamber: *M'Manus v. Lancashire and Yorkshire Railway Company*, 4 H. & N. 327.†

The learned Judges, being divided in opinion, now delivered judgment *seriatim*.

CROMPTON, J.—The declaration in this case charged the defendants as common carriers for hire with negligence, by means of which the plaintiff's goods, received by them to be carried, were lost through their default. A verdict was found for the defendants at the trial, on the fourth and fifth pleas, with leave to the plaintiff to move to enter a verdict for him on those pleas. And a *rule was accordingly granted to enter the verdict for the plaintiff, or for judgment non obstante veredicto on those pleas. [*972]

The fourth plea stated that the goods in question were delivered to and received by the defendants after the passing of the Railway Traffic Act, to be carried under and subject to a certain special contract in that behalf, signed by one George Whittingham for and on account of one Charles Meigh, who was the person delivering the goods to the defendants for carriage, whereby it was agreed that the defendants should not be responsible for the loss or injury to marbles, unless declared and insured according to their value: and that the goods in question were marbles, and were not declared or insured.

The question as to this plea was, whether it was proved. The alleged contract was a note signed as stated in the plea, by which the defendants were directed to forward the marbles *uninsured*. And it was argued before us that this note was proof of a sufficient contract signed under the statute, to the effect stated in the plea, when accompanied and explained by evidence from which it might be inferred that the plaintiff, by having seen the printed conditions of the company and by having had conversations as to the terms on which they carried such goods, must have known that, if the goods were forwarded uninsured, the company, by their condition, would not be responsible for the loss or injury to the marbles. The note did not refer to any printed or written document, or to any conditions, but was simply an order to forward uninsured: and I am of opinion that it did not prove the signed contract alleged. It seems to me impossible to say that the note merely ordering the goods to be forwarded uninsured can amount to a special contract in writing whereby it was *agreed that the defendants should not be responsible for their loss or injury. It is only by admitting parol evidence of what, by the company's regulations, was to be the consequence of non-insurance that there can be any pretence that the note amounted to such an agreement as alleged: and I am of opinion that the contract itself must be looked to; and that it contains no written terms, and no reference to any written document, from which anything like the terms alleged in the plea can be collected. [*973]

The only mode in which it was suggested by Mr. Phipson that he could make out the plea was by the admission of the parol evidence to explain the meaning of the term *uninsured*. There is, however, no ambiguity about that word, nor was any explanation of it necessary; but the object of the evidence was to show the arbitrary consequences which this particular company had, by themselves or by verbal conversations with the plaintiff, affixed to the non-insuring. Such evidence would not be given to explain the meaning of a mercantile word, but would be given to prove the particular conditions of this company. Every company in the kingdom may have a different rule as to the

amount of the responsibility they will take upon themselves with respect to uninsured goods. And such terms and conditions on which, in the given event, the goods are to be carried seem to me to be an essential part of the contract. I think that the statute clearly makes it necessary that such terms and conditions should appear on the face of the written agreement or on some document referred to thereby. It seems to me that we cannot hold the order to forward uninsured as necessarily meaning, in point of law, that the company are not to be responsible in case *974] of loss or injury, however occasioned. Carriers are sometimes said to be in the nature of insurers, so as to be liable in cases of fire, robbery, and other cases where bailees of another description might not be liable: but, even if the agreement that the goods should not be insured could be taken as doing away with such common law liability of the carriers as insurers, they would still be liable for losses by negligence through their own default, with which the defendants are charged in this declaration. The consequences they attach by their conditions to non-insurance may be that they will be liable only to a particular amount, or in particular circumstances; and it appears to me quite impossible that, without the parol evidence, any guess could be made as to what the contract was between the parties, if the law still allowed a verbal contract of this nature. In my opinion, the note ordering the goods to be forwarded uninsured did not, by legal intendment, per se show that the goods were, as stated in the plea, agreed to be carried without the company being responsible for loss or injury: nor was there any legitimate evidence to show that such was the meaning of the written contract. In reality the contract was a parol one, which would have been good before the statute, and which might have been well collected from the oral evidence before that enactment: but there was not any such signed contract in writing as is required by the statute, and alleged in the fourth plea: and I think, therefore, that the plaintiff is entitled to have the issue on the fourth plea entered for him.

The fifth plea stated that the goods in question were delivered and received, after the passing of the said statute, under and subject to a *975] certain just and reasonable condition, made by the defendants, and assented to by the plaintiff, with respect to the receiving, forwarding, and delivering the said goods, that is to say, that the defendants should not nor would be responsible for the loss or injury to marbles, unless declared and insured according to their value; and that the goods in question were marbles, and were not declared or insured. With respect to this plea the question arose, whether a just and reasonable condition, imposed by the railway company, and assented to by the party delivering the goods for carriage, but not in writing, signed by such party, is binding. I think that the plea sets up a special contract between the company and the plaintiff respecting the receiving, forwarding, and delivering of the goods; and that, there being no such contract signed by the party, the plaintiff is not bound.

By the enactment in question all notices, conditions, and declarations limiting the liability of the company as to loss by their neglect or default are made void, with certain exceptions. The company may still protect themselves by the notices published under the Carriers Act, in the particular mode there pointed out as to the particular articles enumerated in that Act. And, by The Railway and Canal Traffic Act, 1854, they

may make "conditions with respect to the receiving, forwarding, and delivering" goods which the Court or Judge trying the cause may adjudge "to be just and reasonable." Such conditions, whether verbal or not, can only operate by way of contract between the parties; and the plea in question, therefore, necessarily avers the assent of the plaintiff. The Carriers Act having prevented such notices being valid, it was still held that, if the plaintiff assented to such conditions or notices, a special contract arose which was *valid under that Act: and, until the late statute, such special contract might be made without writing or signature. But, by several decisions, it was most properly held that the operation of such conditions on the one part and assent on the other was that a special contract arose which limited the liability of the carrier. In the case of *Walker v. York and North Midland Railway Company*, 2 E. & B. 750 (E. C. L. R. vol. 75), it was held that such a contract arose, although the plaintiff had expressly refused his assent in the first instance, he having afterwards sent the goods with notice to him of the terms on which alone the company would carry: and it was held that his so sending the goods was evidence of his assent. This state of the law may have led the Legislature to think it advisable that no party should be bound by such a contract unless he had signed a paper containing the terms of it. They expressly enact "that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering" goods, shall be binding unless signed. The present case appears to me to be within the words and meaning of this proviso: and I think that the true construction of the statute is that pointed out by the late Lord Chief Justice of the Common Pleas in *Simons v. The Great Western Railway Company*, 18 Com. B. 805, 829 (E. C. L. R. vol. 86), and that conditions to operate by way of special contract, which is the only way in which I think they can operate in cases like the present, are special contracts, and require signature under the proviso of the statute. If they are conditions as to receiving, &c., they must be just and reasonable, to have the effect of limiting their liability in cases of loss from their negligence and *default; and, if they are to operate as special contracts, they must, in my opinion, be signed according to the Act. The proviso must have this operation, unless it is held that it is to be construed as containing an exception of special contracts made by conditions on the one side and assent on the other. And I see no reason to insert such words of exception; as I cannot see that the Legislature have necessarily intended such an exception to be made, and I do not feel warranted in inserting any such words. The Legislature may well have intended to have included such a case as the present; and it may be remarked that, in this proviso, they use the very same words as to "receiving, forwarding, or delivering" as they had used in the proviso as to conditions and notices.

Very learned persons have expressed opinions that a special contract within the last proviso need not be reasonable, as a condition under the earlier one; but I find nothing like a distinct decision that a signed contract is not necessary in a case like the present. The authority most in point is the judgment delivered in the case of *Simons v. The Great Western Railway Company*, 18 Com. B. 805 (E. C. L. R. vol. 86), and the following case of *The London and North Western Railway*

Company v. Dunham, 18 Com. B. 826 (E. C. L. R. vol. 86). It is true that in those cases there were signed contracts: but the Court considered and put a construction on the statute, and acted upon such construction in deciding the cases; and they there held distinctly that such a condition as that in the present case must be just and reasonable and must also be signed. Jervis, C. J., in giving judgment in the above cases, after explaining the statute, says: "The result seems to me to be *978] this—A general notice *is void: but the company may make special contracts with their customers, provided they are just and reasonable, and signed; and, whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the Legislature have thought fit to impose the further security, that the Court shall see that the condition or special contract is just and reasonable." I should feel myself bound by this decision of the Court of Common Pleas, proceeding upon the construction put by the Court upon the Act, if I had arrived at a contrary conclusion; and should have contented myself with merely stating that I feel bound by the decision of the Court of Common Pleas, if I had not known that one of my learned brothers in this Court, and some of the learned members of another Court, took a contrary view of the question: and I have, therefore, thought it right to state that, as at present advised, I entirely concur with the Court of Common Pleas in thinking that such a condition imposed by the company requires a signature according to the proviso in question.

I think, therefore, that the condition and assent or agreement in the present case was not binding on the plaintiff. The question was argued before us on the validity of the plea, as containing no allegation that the condition in question was in writing and signed: but, as the plea alleges that the defendants made the condition, and that the plaintiff *assented* to it, and as I am of opinion that, by the statute, there was no *binding assent*, I think that the plaintiff is entitled to have the verdict as well as judgment entered for him on this plea.

I think, therefore, the plaintiff is entitled to our judgment on the whole record.

*979] *ERLE, J.—In this case the questions are, first, whether the fourth plea was proved, and, secondly, whether the fifth plea is good. The declaration was for not safely carrying marbles: the fourth plea alleged a special contract, signed by the plaintiff, that the marbles were to be carried upon the terms therein set out. The evidence was, that the marbles were left to be forwarded, and had become damaged by some damp without wilful default or neglect: that the plaintiff, by his agent, discussed the terms applicable to forwarding marbles either at the company's risk, if insured, or at the owner's risk, if uninsured, and then signed the order to the defendants to forward them uninsured. A written contract is to be construed with the surrounding circumstances. These showed that the goods were marble, and that prepayment of the carriage was not offered. The legal effect of the signed order, then, is this: in consideration of the defendants forwarding the goods as they are, the plaintiff promises to give up his common law right to make the defendants insurers; that is, he agrees that the goods shall be uninsured. The circumstances showed that the plaintiff, by his order, meant to express the sense which would prove the plea, and that the defendants

so understood it: if that be true, the plea was proved. The ordinary meaning of "insured" is that the insurer stands the risk; and "uninsured," that the owner does so.

The inconvenience of requiring every contract to be written out in full is very great. The special contract for carriage set out in *Simons v. The Great Western Railway Company*, 18 Com. B. 805 (E. C. L. R. vol. 86), fills six pages of report: and, if *any part of such contract should be thought by the Judge unreasonable, the whole [*980 may be held void. The result of the judgment in *Wain v. Warlters*, 5 East 10, respecting contracts under the Statute of Frauds, is a warning against repeating a decision which only operates when the absence of an unmeaning form defeats a substantial right. Both parties here understood, from the writing, the terms on which the marbles were to be carried. Yet the construction contended for by the plaintiff would defeat the rights of the defendants according to that understanding, and would get judgment in favour of what would be equivalent to deception.

In *Wyld v. Pickford*, 8 M. & W. 443,† the declaration was, as here, against common carriers, for not carrying maps. The third plea was a notice that the defendants would not be responsible for maps unless insured: and it was held a good plea, on the ground that a delivery of maps with knowledge of the notice was an agreement that the common law liability should be limited by the notice, and that the plea sufficiently alleged such an agreement, although it did not allege the plaintiff's consent. If the same intendments that were made there were made in this case, the plea would be proved; and, if, after such notice, such articles are delivered, the agreement is to perform all the common law duties of carriers except insuring; and, if there is a notice against insuring, the risk of damage not arising from misfeasance is the owner's. The same intendments would make the order relied on to prove the fourth plea a special contract: and I am of opinion that they ought to be made, and that the plea should be held to be proved.

*The question raised by the fifth plea turns on the construction of the 7th section of the statute. The plaintiff contends that all [*981 contracts tending to limit responsibility for default or neglect in the carriage of goods are thereby made void unless they are signed by the opposite party, and also adjudged to be just and reasonable by the presiding Judge. The plea relies on a contract adjudged by the Judge to be just and reasonable, but not signed. The defendants contend that the clause making void all *notices, conditions, and declarations* given by the company, limiting their liability on the carriage of goods, relates to the general notices which have been resorted to by carriers from time to time, and which, before railways existed, were the subject of legislation in stat. 11 G. 4 & 1 W. 4, c. 68; and that this clause, making void all notices, &c., given by companies for limiting liability, is subject to the exception of such notices, &c., as should be adjudged to be just and reasonable: but that *special contracts* entered into by both parties are contradistinguished from the notices, &c., given by the companies; and that, as to them, the proviso assumes that they may be made, but shall not be enforced by the railway unless signed by the opposite party.

If the Legislature intended to make all contracts for limiting responsibility of railways void unless adjudged to be just by the Judge and

signed by the opposite party, the language would be used which would express the law without complexity. But the enactment makes a clear distinction between notices, &c., given by the company which are to be void unless adjudged to be just, &c., and special contracts which are made void for the railway unless signed by the other party. The context *982] shows that special contracts in the later proviso are different from the notices, &c., spoken of in the earlier proviso, there being many distinct provisos about animals, &c., interposed.

Stat. 11 G. 4 & 1 W. 4, c. 68, incorporated in this Act, confirms this construction, as, by sect. 1 there, all notices, &c., are made void, while, by sect. 6, the power of making special contracts as the parties may choose is expressly preserved. The purpose of the legislation confirms this view.

As a general rule, common carriers must take what is brought for carriage, and must carry safely and deliver correctly. In effect they must insure against the risk of the journey. This extreme responsibility by compulsion has produced endeavours by carriers for protection which have been thought to have been in the opposite extreme, such as general notices that they may have no responsibility, even for misfeasance, for certain articles. Extreme notices may with reason be declared null, while reasonable notices are allowed to be valid: and so are the words of the enactment; and so is the defendants' construction. The plaintiffs construction involves the notion that the Legislature in effect invaded the rights of private property invested in railways, and not only subjected the railway proprietors to the discretion of various Courts in the management of their property, and prohibited them from consulting their own interest or following their own plans as they might choose, but also, by the 7th section, made them subject to the duty of carrying whatever should be offered, without any power either of limiting responsibility or of making any contracts as interest might require, unless their contracts fulfilled the two conditions of being signed when they *983] are made and being adjudged to be reasonable by the Judge before whom they might be brought for enforcement. The extent of the risk of leaving an arbitrary discretion to the Judge to say whether a contract is reasonable may be estimated from *Simons v. The Great Western Railway Company*, 18 Com. B. 805 (E. C. L. R. vol. 86), where a contract that a company should not be answerable for loss or non-delivery of goods by reason of insufficient and improper package was adjudged void; and from *Munster v. The South Eastern Railway Company*, 4 Com. B. N. S. 676 (E. C. L. R. vol. 93), in which a regulation that passengers should not place wearing apparel, shawls, and the like, in the luggage van without some wrapper to cover them, was also held void.

As to authorities on this question, *Simons v. The Great Western Railway Company* and the *London and North Western Railway Company v. Dunham*, 18 Com. B. 826 (E. C. L. R. vol. 86), are in favour of the plaintiff. But *Wise v. Great Western Railway Company*, 1 H. & N. 63,† cited arguendo in *Simons v. The Great Western Railway Company*, is in favour of the defendants. And, as I entirely concur with the opinions of Pollock, C. B., and Bramwell, B., there cited, I consider myself at liberty to dissent from the opposite opinion expressed by Jervis, C. J., in the other case.

I am of opinion that the fifth plea is good.

CROMPTON, J., then read the judgment of

Lord CAMPBELL, C. J.(a)—In this case I agree with my brother Crompton that the plaintiff is entitled to our judgment both on the fourth and fifth pleas.

*As to the fourth plea, notwithstanding my sincere respect for the opinion of my brother Erle, I am bound to confess that I have never been able to entertain any doubt. It is expressly pleaded under stat. 17 & 18 Vict. c. 31; s. 7; and it expressly alleges a special written contract, whereby it was agreed that the defendants should not be responsible for the loss of or injury to marbles unless declared and insured according to their value. The only written document signed as required by the statute was a note by which the defendants were directed to "forward" the marbles "*not insured*." This refers to no other written document; and the alleged contract could only be made out by parol evidence which the Legislature clearly intended should not be admitted for the purpose of limiting the liability of railway companies. I do not think that we can properly listen to arguments from the supposed hardship upon the defendants in this particular case: and, for the future, railway companies may easily render themselves secure by having printed forms of their special contracts, to be signed by the person delivering the animals or goods as the Act requires. [*984]

The fifth plea depends entirely on the construction to be put on one of the many provisos to be found in the seventh section of stat. 17 & 18 Vict. c. 31. This section is exceedingly ill drawn, heaping proviso upon proviso, and forgetting the distinction between an enactment and a proviso to qualify an enactment. Introduced by the words "provided also," it contains the following enactment: "no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect *any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage." The fifth plea does not allege that the condition or agreement made by the defendants with respect to the receiving, forwarding, and delivering the marbles was in writing, or signed by the party, but alleges that the plaintiff *assented* to it. I think that this raises the question whether the condition must be in writing and signed as the above enactment requires. [*985]

Is this condition with respect to the receiving, forwarding, and delivering goods a *special contract* between such company and the plaintiff respecting the receiving, forwarding, or delivering goods? I cannot discover why it is not; and, if it be, then it is not binding, because it is not signed as required. Surely it is not less a special contract between the company and the plaintiff because, to be valid, it must be "adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable." The defendants' counsel did not contend that this condition was written or signed. Therefore, if it constituted a special contract, it is not binding, and the fifth plea is not proved. This seems to be in accordance with the view taken of the statute by Jervis, C. J., in *The London and North Western Railway*

(a) Coleridge, J., who was present at the argument, had retired from the Bench before judgment was delivered.

Company v. Durham, 18 Com. B. 826, 829 (E. C. L. R. vol. 86), in which I entirely concur.

In the argument at the bar, we were told of the impolicy and injustice of such an interference with the contracts of railway companies: but, when the meaning of the Legislature is clear from the language of an Act of Parliament, I do not feel myself at liberty, in construing it, *986] to form any opinion whether it be politic or *impolitic, just or unjust. I sit here jus dicere, non jus dare. An absurd or mischievous enactment is to be repealed by the Legislature, and not by judicial decision. Therefore with great deference for all who entertain the contrary opinion on this subject, I think that the plaintiff is entitled to have the verdict entered for him on the fourth and fifth pleas, with the damages found by the jury, and that the rule obtained for that purpose ought to be absolute.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

[Jan. 12, 1860.]

The NORTH STAFFORDSHIRE Railway Company, Appellants,
v. PEEK, Respondent.

[For syllabus, see antè, p. 958.]

THE defendants in the Court below gave notice of appeal. The case on which the appeal was brought stated the facts in substance as above.

The appeal was argued in the Exchequer Chamber in Trinity and Michaelmas Vacations, 1859.(a)

Keating, (b) for the appellants (defendants below).—First, as to the fourth plea. It is clear, as a matter of fact, that the respondent was made acquainted with the condition upon which the appellants were willing to insure; and that, by using the term “not insured” in his letter of the 1st August, he intended that it should be understood between *987] *himself and the company that that condition had not been fulfilled. The only question is whether there is a written contract to that effect. Now, in the first place, the letter itself is perfectly unambiguous. A carrier, at common law, insures against all risks except the act of God or the Queen’s enemies. The words “not insured” clearly refer to, and exempt the appellants from, their ordinary liability at common law. The respondent contends that the extent and nature of the exemption is not shown by the words “not insured.” Even if that be so, the ambiguity may be explained by oral evidence. [WILLIAMS, J.—Not if the words themselves raise the ambiguity. The evidence would be admissible only if it could be shown that the words might refer to either of two different subject-matters.] The words, upon the face of them, import what the plea alleges. [MARTIN, B.—Is the plea sufficient? It does not deny the negligence.] It is, in fact, an argumentative plea of Not guilty. The respondents would, at all events, have been entitled to a verdict upon the plea traversing the bailment as

(a) June 18th, 1859, and November 26th, 1859.

(b) Between the two days on which the case was argued, Mr. Keating was appointed Solicitor-General.

alleged: (a) *Brind v. Dale*, 2 M. & W. 775.† But a plea similar to the fourth, in *Wyld v. Pickford*, 8 M. & W. 443,† was not demurred to. [WILLES, J.—The declaration there was different.] The fourth plea, at all events, is not now open to any technical objection.

As to the fifth plea, there is, no doubt, considerable difficulty in supporting it since the decision, in error, in *M'Manus v. Lancashire and Yorkshire Railway Company*, 4 H. & N. 327.†(b)

**T. Jones* (Northern Circuit), for the respondent (plaintiff [988 below).—The fourth plea is not proved. Unless it was intended that written special contracts under the Act might be varied by oral evidence, there is no evidence of any such contract as that alleged by the appellants. The words “not insured,” construed in their ordinary sense, have no such meaning. They are not a term of art, and therefore cannot be explained by oral evidence. [CROWDER, J.—What do you say they mean?] They mean “send these goods on such terms, as to your liability, as attach to carriers where parties send goods without insuring, when there is no special contract in writing.” Now, what the liability of the company is, under those circumstances, is explained by sect. 7 of the Act, which takes away from carriers the power which they possessed, under the Carriers’ Act, of exempting themselves from their common law liability by notices and declarations. There is here no special contract in writing, signed by the owner or deliverer of the goods; and the appellants are therefore liable as carriers at common law. [MARTIN, B.—I think it can hardly be said that the words “not insured” have no particular meaning, as regards carriers.] They point, no doubt, to a particular course of business; but their meaning may vary very much in each case. That was clearly the opinion of Lord Campbell, C. J., and Crompton, J., in the Court below. And, if that be correct, oral evidence is not admissible for the purpose of stamping these words, when written, with a particular meaning in any one case. There is no reference in the correspondence to any particular terms or conditions of insurance. The decision in *Boydell v. Drummond*, 11 East 142, [*989 *therefore applies. Further, the contract, even if it be one, is not signed, as the Act requires, by the owner or the deliverer of the goods. [CHANNELL, B.—It was assumed at the trial that the person who signed it did so as agent of the parties delivering: there was, therefore, a sufficient delivery within the statute.] That is giving a very wide construction to the words parties “delivering;” a similar construction of the words “party chargeable,” in stat. 9 G. 4, c. 14, s. 1, was held bad in *Hyde v. Johnson*, 2 New Ca. 776 (E. C. L. K. vol. 29).

Sir *Henry Keating*, Solicitor-General, (c) was heard in reply.

Cur. adv. vult.

The learned Judges, being divided in opinion, now delivered separate judgments.

MARTIN, B.—I am about to read the judgment of the Chief Baron, of my brothers Willes, Watson, and Channell, and of myself.

This is an appeal against a decision of the Court of Queen’s Bench, making a rule absolute to enter a verdict for the plaintiff upon the issues

(a) See p. 959, note (a).

(b) In Exch. Ch., reversing the judgment of the Court of Exchequer in *M'Manus v. Lancashire Railway Company*, 2 H. & N. 693.†

(c) See p. 986, n. (b).

on the fourth and fifth pleas, upon points reserved at the trial by my brother Erle. The Court were divided in opinion, my brother Erle differing from Lord Chief Justice Campbell and my brother Crompton. The action was against the defendants as common carriers: the bailment alleged in the declaration was a delivery to them, as common carriers, of three marble chimney-pieces, to be carried *from Stoke *990] upon Trent to London. The fourth plea is that the chimney-pieces were delivered and received to be carried under a special contract, signed by one G. Whittingham for one Charles Meigh, who was the person delivering the goods to the defendants, whereby it was agreed that the defendants should not be responsible for the loss or injury to marbles unless declared and insured according to their value: that the goods were marbles, and were not declared or insured in manner provided for by the contract. The fifth plea was founded upon the defendants' general notice: but the late Solicitor-General, who argued the case for the defendants, stated that he could not support it after the judgment of this Court in *M'Manus v. Lancashire and Yorkshire Railway Company*, 4 H. & N. 327.† There was also upon the record a plea traversing the bailment as alleged: (a) but this plea was not referred to in the special case. The material facts are these. The plaintiff was the owner of the chimney-pieces, and had directed Mr. Meigh to forward them to London. On the 30th June, 1857, a notice was delivered to Mr. Meigh by the defendants, as follows: "The North Staffordshire Railway Company hereby give notice that they will receive, forward, and deliver goods solely subject to the conditions hereunder stated:" and amongst the conditions was: "That the company shall not be responsible for the loss of or injury to any marbles," &c., "unless declared and insured according to their value." In the beginning of July, Mr. Meigh sent the chimney-pieces to the defendants' station at Stoke, and directed the carter to inquire what the insurance would *991] be. The carter did as he was ordered, and took back a *message to Mr. Meigh, from the defendants' chief clerk, that he could not tell until he knew what the value of the marbles was. A day or two afterwards, the clerk wrote to Mr. Meigh, stating that the amount of the insurance depended upon the value, and requesting to know for what amount the marbles were to be insured. On the 10th July, the following letter was written on behalf of Mr. Meigh to the clerk of the defendants. "Old Hall Manufactory, Hanley, Staffordshire, 10th July, 1857. Mr. Corden. Dear Sir, Please inform us, as early as possible, what is your rate of insurance on marble; and we will give you an answer to your inquiries respecting the packages delivered to you on receipt of your reply; and oblige yours truly, for C. MEIGH & SON, GEORGE HARDING. Rate per cent."

Upon receipt of this letter the clerk went to Mr. Meigh's place of business, and saw his son, and told him that until he knew the value, he could not tell the amount of insurance. Mr. Meigh's son could not tell the value. There then followed a letter from Mr. Meigh, of the 16th July, as follows. "You will much oblige by sending me the rates of insurance on marbles, as written for last week." A clerk of the defendants, on the same day, answered the letter as follows. "Stoke upon Trent, 16th July, 1857. Gentlemen, I regret that there has been

a misunderstanding in reference to the marble which you wish to insure. I desired a clerk to wait upon you for a description of the marble and its value; and I understand that that information would be furnished, and have been waiting to receive it. It is necessary, before fixing the rate of insurance, that we should perfectly understand the nature and amount of risk that we are about to undertake, and will lose no *time in getting the rate of insurance fixed, when you oblige [992 me with this information. I believe you have already been informed that we cannot insure the marble beyond London. I am, gentlemen, Yours very respectfully, H. S. MILLER. To Messrs. C. Meigh & Son, Hanley."

Several verbal messages afterwards passed between the parties, prior to the 1st August: and, in the result, the clerk of the defendants stated that he could not forward the marbles unless he had written instructions from Mr. Meigh as to whether they should forward them at his risk uninsured, or at the risk of the Company insured; that, if uninsured, the charge would be 55s. a ton, but, if insured, the charge would be 10l. per cent. on the declared value in addition. On the 1st August the following letter was written and sent by Mr. Meigh's authority. "Hanley, 1st August, 1857. North Staffordshire Railway Company. Gentlemen, Please to forward the three cases of marble, *not insured*, as directed, to W. Peek, Esq., to be called for at the Camden Goods Station, London, and oblige Yours respectfully, C. MEIGH, per G. WHITTINGHAM."

On the same evening, the chimney-pieces were sent off; and the charge for carriage made was 55s. per ton, the uninsured rate. They arrived in London: but, upon being opened, it was found that they had received damage to a considerable amount from rust from the nails of the cases having soaked through and discoloured the marble.

The question is, whether, upon these facts, the verdict is to be entered upon the fourth plea for the plaintiff or the defendants.

Upon the facts themselves, independent of the 7th section of stat. 17 & 18 Vict. c. 31, we apprehend no *doubt can exist but that [993 the defendants are in the right. Before the 1st August, the plaintiff's agent was told that he might either forward the chimney-pieces *uninsured* at the owner's risk, at the rate of 55s. per ton, or insured at the defendants' risk, with an addition of 10l. per cent. on the declared value. By the letter of the 1st August, he directed them to be forwarded "*not insured*." It is impossible that the intention of the consignor could be more clearly expressed: and, upon the receipt of this letter, the chimney-pieces were immediately forwarded to London at the non-insured rate of 55s. per ton. We, however, quite agree that the case must be decided upon the construction of the 7th section; and that the defendants cannot succeed except its requirements be satisfied.

It begins by enacting that the railway company shall be liable for loss or injury to goods notwithstanding any notice limiting their liability; every such notice being thereby declared to be null and void. There are then five provisos. The 1st is not material to the present case. The 2d relates to animals, and is only material that it refers to the Carriers Act, 11 G. 4 & 1 W. 4, c. 68. The 3d is also not material. The 5th again refers to the Carriers Act. And the 4th, upon which the

present question depends, enacts: "That no special contract between such company and any other parties respecting the receiving, forwarding, or delivering" of goods "shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such" goods "for carriage."

The plaintiff's contention is, that there was no special contract so signed. The special contract referred to in the 4th proviso is clearly that mentioned in the 6th section of the Carriers Act, which enacts that *994] nothing in that Act should affect any special contract between the carrier and the other party for the conveyance of goods. And the operation of the 4th proviso is, that the contract, to be of avail, must be signed; which imports that its terms must be in writing. In our opinion, the letter of the 1st August, and the acting of the defendants upon it, does constitute a special contract signed within the meaning of the proviso; and that the effect of it is to relieve the defendants from the risk.

It was objected that it was not signed by a proper party: and some cases were cited respecting the signature to acknowledgments, to take cases out of the Statute of Limitations: but they seem to us to have no application; and we entertain no doubt that the signature "C. Meigh," the person delivering the goods, "per G. Whittingham," satisfied the 4th proviso.

The next question is, Whether the letter of the 1st August and the forwarding of the chimney-pieces by the defendants upon the terms proposed in it is a special contract within the 6th section of the Carriers Act. It was decided, in *Smith v. Neale*, 2 Com. B. N. S. 67 (E. C. L. R. vol. 89), that a proposal to contract in writing, signed by the defendants and accepted by the plaintiff by parol, satisfied the 4th section of the Statute of Frauds, so as to bind the defendants. This is conclusive as to the form. And the remaining question is as to the terms of the letter. And in our opinion, whether the letter be read with the light cast upon it by the Carriers Act itself, or by that of the other letters and facts stated in the case, or simply by itself, it proposes to contract for the carriage of the marbles upon the term that the defendants should *995] be free of risk. *First, we think, and that clearly, that it can be read with the aid of the Carriers Act. And the whole tenor of that Act, and more especially the 3d section, shows that the term "insured," in reference to goods conveyed by carriers, means goods carried at their risk: and, if so, the term "not insured" must of necessity mean goods carried at the owner's risk. Secondly, we are of opinion (although, considering the opinions entertained by others, not so decidedly) that the letter may be read with the aid afforded by the other letters and facts in the case: and, if so, we should think that no one can doubt but that the writer meant to express by the term "not insured" that the plaintiff, and not the defendants, was to bear the risk. And, thirdly, we are of opinion that the letter, simply by itself, read according to the understanding of language existing between carriers and their customers (in which sense we think the letter ought to be read), indicates by the words "not insured," as written in it, the intention of the consignor, and was so understood by the defendants, that the owner, and not they, was to bear the risk, as clearly, and indeed more so, to their minds, than as if the special contract had been drawn

up at an attorney's office in the most minute and full professional form. For these reasons we think the defendants have a legal defence to the plaintiff's claim.

The next question is: do the facts stated in the case, upon a fair and reasonable construction, support the averments of the 4th plea? And we think they do. The first averment is, that the marbles were delivered to and received by the defendants to be carried and conveyed under and subject to a special contract signed by G. Whittingham for and on account of Charles Meigh, the *person delivering them: and we have already stated that we think this averment proved. The [996 second averment is, that, by this contract, it was agreed that the defendants should not be responsible for the loss or injury to the goods unless declared and insured according to their value. And the point is, whether the terms "not insured," as contained in the letter of the 1st August, is satisfactory evidence of this; that is, such evidence as a jury ought to act upon: and we think it is. The amount of insurance must depend upon the value of the goods. The same amount would not be paid for marble of 10*l*. value as of 100*l*. The transaction itself, therefore, indicates that there must be a relation between the price of insurance and the value of the goods. Again, the value must of necessity be declared to enable the amount of the insurance to be ascertained. And we therefore think there was evidence of this averment. And as to its truth we entertain no doubt. As to the third and last averment of the plea, it was clearly proved.

But, even if this were not so, the case of *Brind v. Dale*, 2 M. & W. 775,[†] shows that, upon the facts, the defendants were entitled to the verdict upon the plea traversing the bailment: (a) and we should have been prepared (following the precedent already made in this Court) to have sent the case down for a new trial in order that right might prevail.

For these reasons we concur with the opinion delivered by my brother Erle, and think that the judgment of the Court of Queen's Bench ought to be reversed, to the extent that the verdict be entered for the defendants upon the issue joined on the 4th plea.

*WILLIAMS, J.—I am of opinion that the judgment of the [997 Queen's Bench ought to be affirmed.

The question, and the only question which has been brought before the Court, is, whether the 4th plea has been proved: and I am of opinion that it has not.

I must begin by observing that the frame of the plea makes it necessary to prove that the plaintiff signed the special contract therein described. No rule is more clearly established than that contracts stated in pleadings are in their nature entire, and must, therefore, be entirely and substantially proved as laid; and, though the importance of this doctrine has been greatly lessened by reason of the power commonly exercised of amending variances, yet the rule itself, I apprehend, remains wholly unimpaired, and, when applied to the plea under consideration, makes it necessary to prove the whole contract in its alleged terms.

Now those terms do not allege simply a contract that the particular goods were to be at the plaintiff's risk during the transit. The plea

(a) See p. 959, note (a).

describes the contract as a general one that the defendants shall not be responsible for the loss of or injury to marbles generally, unless declared and insured according to their value; and then the plea proceeds to bring this particular case within these terms by alleging, as a matter of fact, that the goods in question were marbles, and not declared and insured. Looking at the evidence given at the trial, it is quite plain that what the plea means to aver is, that the plaintiff signed an agreement embodying the terms of the fifth of the printed conditions which the defendants had made and issued as to sending marbles (amongst other things) uninsured. Possibly the pleader had a discreet motive for *998] this mode of pleading. The plea *would be open to different considerations as to the reasonableness and validity of the contract alleged, if it had been stated as an absolute and unqualified agreement that the defendants should not be responsible for any loss or injury to the goods during the transit. And, moreover, the contract described in the plea is really the one into which the parties appear, by the evidence, to have entered. Accordingly, the main argument of the counsel for the defendants, both in the Court below and in this Court, was, that the contract so described has been fully proved. For their contention was, that the terms of the signed order, "please to forward the three cases of marble, not insured," are equivalent to saying "forward the marbles on the conditions which you have made as to uninsured marbles."

It seems, therefore, to me that, in order to sustain the plea in evidence, it is necessary to prove that the plaintiff signed an agreement embodying the fifth of the printed conditions. For the truth is, that the special contract alleged in the plea is contained in that condition: and the real question is, whether the terms of the instrument which the plaintiff signed can be said to incorporate the condition, either by their own force, or by reference to it, so as to import it into the signed instrument: and I am of opinion in the negative.

It is said that the signed instrument signifies that the goods are to be forwarded on the footing of the condition, by force of the words "not insured." I concede that, looking at the evidence, no doubt can be entertained that the parties so intended. But the question is whether the document which the plaintiff signed expresses that intention. This is not a case where the evidence shows that the parties conventionally *999] used a *particular word or phrase to denote something different from its ordinary meaning. The words "not insured" are used in their ordinary and natural sense. But the fact is, that the parties, by word of mouth, and by exhibiting the printed conditions, and by their letters, had given each other to understand that certain consequences were to follow non-insurance. Whether those consequences were to be that the goods should be at the sender's risk absolutely, or in a qualified way, or beyond a partial amount, or in respect of what perils, the signed instrument does not in any way express. We know that the fifth of the printed conditions stipulated that the company should not be responsible for any loss or injury to the goods, being marbles. But we derive our knowledge of this part of the agreement from the evidence of the making of the conditions by the defendants, and the conversations and correspondence of the parties respecting them, and not in the least from the words "not insured" in the signed instrument. In the present case the

evidence as to the stipulated consequence of non-insurance happens to be undisputable. But suppose the case had been such as to admit of the plaintiff's denying that he had ever had the fifth condition brought to his knowledge, or to admit of his asserting that he understood the consequences of non-insurance to be, that the company should not be liable for the goods beyond a certain amount, or that their irresponsibility was to be subject to certain exceptions; as, for instance, damage attributable to the neglect of their servants, or the insufficiency of the carriages or of the iron rails. It is obvious that, in such a case, this evidence, as well as all the conflicting evidence on the part of the defendants, as to what were the understood consequences of [*1000 *non-insurance would be admissible, if such evidence is receivable in the present case. And thus the very uncertainty, and unsatisfactory conflict of testimony, which it was the object of the statute to prevent, would be let in. As to this part of the argument, I need have done no more than refer to the judgment of my brother Crompton, in the Court of Queen's Bench, which appears to me to be quite unanswerable.

It remains to consider whether the fifth of the printed conditions can be regarded as imported into the signed contract.

It is certainly allowable, where one instrument refers to another, to look at the latter, and regard it as embodied in the former; as in the familiar example of a duly-executed will referring to a prior unattested will or other paper. But it is not allowable to connect the two by parol evidence. A long series of authorities has fully established the rule, as laid down in *Smart v. Prujean*, 6 Ves. 560, that the paper, into which the other paper is sought to be incorporated, must refer to it so as to manifest what paper it is. These cases have proceeded on the same principle as that of *Boydell v. Drummond*, 11 East 142, which was cited by Mr. Jones before this Court. There it was sought to connect the defendant's signature in a book entitled "Shakespear Subscribers" with a printed prospectus which was delivered at the same time to the subscribers to "Boydell's Shakespear," and by this means to constitute a signed writing sufficient to satisfy the Statute of Frauds. But the Court held that this could not be allowed; for, as the signed writing did not refer to the prospectus, they could not be connected without *parol evidence, which it was the object of the statute to pre- [*1001 clude.

So, in the case of *Hinde v. Whitehouse*, 7 East 558 (the statement of which I adopt from my brother Blackburn's book *On The Contract of Sale*, p. 47), the sale was by auction, subject to certain conditions; a paper containing the conditions was read by the auctioneer, and then laid on his desk; he wrote down the purchaser's name opposite the lots in his catalogue, which was headed "to be sold by auction, for particulars apply to Thomas Hinde," but contained no internal reference to the conditions. The King's Bench held that the bargain was contained in the conditions, and that there was no signed memorandum of the bargain; that which there was, Lord Ellenborough said, was a minute made on the catalogue of sale, which was not annexed to the conditions of sale, nor had any internal reference to them by the context or the like, and was not, therefore, a memorandum of a bargain under those conditions of sale. And precisely the same point was afterwards decided in *Kenworthy*

v. Schofield, 2 B. & C. 945 (E. C. L. R. vol. 9). The principle of these cases seems to me to be well stated in the same work by my brother Blackburn, p. 47, as follows. "If the contents of the signed papers themselves make reference to the others so as to show by internal evidence that the papers refer to each other, they may be all taken together as one memorandum in writing; but if it is necessary in order to connect them, to give evidence of the intention of the parties that they should be connected, shown by circumstances not apparent on the face of the writings, the memorandum is not all in writing, for it consists *1002] partly of the contents of the writings and partly of the expression of an intention to unite them, and that expression is not in writing."

In accordance with these doctrines, the recent case of *Holmes v. Mitchell*, 7 Com. B. N. S. 361, was decided by my learned Brothers in the Court of Common Pleas. In that case the Court held that a certain letter addressed by the defendant to the plaintiff was not a sufficient guarantee within the fourth section of the Statute of Frauds, as the whole promise could not be made out without reference to parol evidence: and, in delivering the judgment of the Court, my brother Byles thus expresses himself. (a) "The whole promise, therefore, is not in writing, as the statute requires that it should be. It cannot be made out without reference to previous conversations. In *Shortrede v. Cheek*, 1 A. & E. 57 (E. C. L. R. vol. 28), and in *Bateman v. Phillips*, 15 East 272, an existing document or an existing debt was referred to in the writing, so that evidence of oral statements was not necessary to explain the promise. The recent statute, 19 & 20 Vict. c. 97, s. 3, it is true, abrogates the rule laid down in *Wain v. Warlters*, 5 East 10, and enables a party to give parol evidence of the consideration for a guarantee. But a consideration expressed in writing formerly discharged two offices, it sustained the promise and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further, and explain the promise." In the present case it appears to me impossible to main- *1003] tain that the contents of the signed instruments themselves made reference to the printed conditions, so as to show by internal evidence that the papers refer to each other.

On the whole, therefore, since no document can constitute a special contract which does not contain the terms of it, I think the signed order under our consideration does not amount to such a special contract as is described in the fourth plea, and therefore that the plea has not been sustained in evidence.

It is, no doubt, an irksome thing to decide that the defendants shall be made responsible in a case where it is clearly proved that the goods were carried on an agreement that they should not be so responsible. The same reluctance, however, would accompany such a decision, if the facts were that the plaintiff was clearly shown to have assented to be bound by the printed conditions, but had not expressed his assent by signing them as required by the statute. In that case it is plain that the Court could not decide for the defendants, without disregarding an Act of Parliament. In the present case it is equally plain to my mind that they cannot do so without disregarding the long-established rules of the law.

Judgment reversed.

(a) From the report it appears that Mr. Justice Byles's judgment was read by Williams, J.

*IN THE EXCHEQUER CHAMBER. [*1004

HENRY COURTHORN DALE, WILLIAM HENRY MORGAN,
and THOMAS MORGAN, v. CHARLES HUMFREY. *July 5.*

D. M. & Co., brokers in London, being employed by one S. to purchase oil, dealt with T. & M., brokers, who were employed by plaintiff to sell oil, without either broker disclosing the names of their principals. D. M. & Co. delivered to T. & M. a note as follows: "Sold this day for Messrs. T. & M. to our principal ten tons of oil," specifying the terms and price, which was above 10*l*. The note was signed D. M. & Co., brokers. Quarter per cent. brokerage to D. M. & Co. D. M. & Co. did not disclose the name of their principal S. till after the lapse of an unreasonable time, when S. had become insolvent. Plaintiff sued D. M. & Co. for not accepting the oil, laying the sale as by himself to D. M. & Co. Defendants denied the contract. On the trial, plaintiff proved a custom in the trade that, when a broker purchased without disclosing the name of his principal, he was liable to be looked to as principal.

Held, by the majority of the Court of Exchequer Chamber (Cockburn, C. J., Pollock, C. B., Williams and Crowder, Js.), affirming the judgment of the Queen's Bench, that evidence of the custom was admissible, as not contradicting the written instrument, but explaining its terms, or adding a tacitly implied incident; and that the note thus explained was a sufficient memorandum of the contract sued upon to satisfy the Statute of Frauds; and that the action lay.

Dissentientibus Willes, J., and Martin and Channell, Bs.

THIS was an appeal from the decision of the Court of Queen's Bench in discharging a rule to enter a nonsuit pursuant to leave reserved at the trial.(a)

The following was the case stated on appeal.

This action was for not accepting linseed oil alleged to have been bargained and sold by the plaintiff to the defendants.

The plea denied the bargain and sale.

The plaintiff below (Humfrey) had employed Messrs. Thomas & Moore, who were brokers in the city of London at the time, to sell the oil in question for him. One Schenk was a buyer of oils, and had employed the defendants, who were also brokers in the city of London, to buy oil for him.

*The dealing in question was between the brokers, without disclosing the names of their principals. [*1005

In order to prove the alleged contract the plaintiff gave in evidence two notes of which the following are copies.

"75, Old Broad Street.

"London, 14th August, 1855.

"Sold this day, for Messrs. Thomas & Moore to our principal, ten tons of linseed oil, of merchantable quality, at 44*l*. per ton, real tare and usual draft: to be free delivered during the last fourteen days February next, and paid for in ready money, allowing 2½ per cent. discount.

"DALE, MORGAN & Co., brokers.

"Quarter per cent. brokerage to D. M. & Co."

"No. 54. London, 14th August, 1855.

"Sold to Dale, Morgan & Co., for account of Mr. Charles Humfrey, ten tons linseed oil, of merchantable quality, at 44*l*. per ton, real tare and usual draft: to be free delivered during the last fourteen days

(a) See *Humfrey v. Dale*, 7 E. & B. 266 (E. C. L. R. vol. 90).

February next, and paid for in ready money, allowing $2\frac{1}{2}$ per cent. discount.

"THOMAS & MOORE, brokers.

"Quarter per cent. brokerage to D. M. & Co., a half to us."

The first note was signed and sent by the defendants to the said Thomas & Moore. The second note was signed and sent by Thomas & Moore to the plaintiff, and was the copy of a note entered and signed by them in their brokers' book. No note whatever of the contract was sent by Thomas & Moore to the defendants. The plaintiff further gave in evidence that, according to the usage of the particular trade, whenever a broker purchases or sells oil without disclosing the name of his *1006] principal, he is himself liable *to be looked to as the purchaser or seller, as the case may be. And that it was in accordance with the usual practice in such cases that Thomas & Moore did not send the defendants any note of the contract. The defendants did not disclose their principal till after the oil in question had been tendered to them by the plaintiff, according to the terms of the contract, and when their principal had become insolvent.

It was contended on the part of the defendants that the plaintiff ought to be nonsuited, upon the ground that there was no evidence of the alleged contract within the Statute of Frauds.

Mr. Justice Coleridge, before whom the cause was tried, directed the verdict to be entered for the plaintiff for the sum of 101*l.* 12*s.*, reserving leave for the defendants to enter a nonsuit, if the Court of Queen's Bench should be of opinion that there was no evidence for the jury of the alleged contract between the plaintiff and the defendants.

Afterwards, on 3d May, 1856, upon the motion of the defendants' counsel, a rule was granted by the Court of Queen's Bench, calling upon the plaintiff to show cause why the verdict should not be set aside and a nonsuit entered, on the grounds: "(1). That there was no evidence of the alleged contract of sale and purchase; (2). That evidence of the alleged custom was not admissible."

Cause was shown against the said rule on the 4th November, 1856; and the Court of Queen's Bench, on 26th January, 1857, directed that it should be, and it accordingly was, discharged.

Against that decision the defendants now appeal; and they submit that the rule should have been made absolute.

*In Hilary Term, 1858,(a)

*1007] *Manisty* argued for the appellants, defendants below.—The point made at the trial, that there was no evidence of the contract, is made out, unless there was both evidence of the contract in fact, and a written memorandum of that contract, signed by the defendants, or an agent on their behalf, so as to satisfy the Statute of Frauds, 29 C. 2, c. 3, s. 17. The note signed by the defendants is not a memorandum of a contract to buy as vendees, but of a contract, made by them as brokers, that their principals bought as vendees; and that was the truth. The note, signed Thomas & Moore, was not a contract note signed by agents for the defendants, the evidence showing that Thomas & Moore were not acting in any way as brokers for the defendants.

(a) On Thursday, January 21st, 1858, before Cockburn, C. J., Pollock, C. B., Williams, Willes, and Crowder, Js., and Martin and Channell, Bs.; on Friday, January 22d, before the same Judges and Watson, B.

Pigott, Serjt., contrâ.—The note signed by the defendants states that they have sold, that is, as brokers have effected a sale, to their unnamed principals; and the usage is that, in such a case, they may be looked to as the purchasers. If that usage may be read as part of the note, it is a contract of sale to the defendants as purchasers, if the vendors please. The form of a note, "Sold for you," does not prevent either party from showing that the person signing the note was no agent for the vendor, but either solely agent for the purchaser, or himself principal: *Moore v. Campbell*, 10 Exch. 323;† *Pennell v. Alexander*, 3 E. & B. 283 (E. C. L. R. vol. 77). The Statute of Frauds does not exclude *evidence to show that an unnamed principal is bound by a contract made in the name of his agent: *Wilson v. Hart*, [*1008 7 Taunt. 295 (E. C. L. R. vol. 2); *Bateman v. Phillips*, 15 East 272; *Schmaltz v. Avery*, 16 Q. B. 655 (E. C. L. R. vol. 71). And a usage of trade such as this is incorporated in all written contracts which do not exclude it: *Hutton v. Warren*, 1 M. & W. 466.† (He cited on this point the authorities referred to in the judgment in this case below.(a)) But, at all events, the note signed by Thomas & Moore is in form a perfect memorandum of the contract. It is said that they were not the defendants' agents; but the mere fact of dealing with a broker or auctioneer gives him authority to bind the contract by signing a memorandum of it in the customary manner. It is true that in general the broker does that by delivering notes to each side; but here the usage dispenses with that.

Manisty was heard in reply.

Cur. adv. vult.

The learned Judges, not being unanimous, now delivered judgments seriatim.

WILLES, J.—I am of opinion that there is no writing in this case to satisfy the Statute of Frauds, because the only writing relied upon shows the defendants to have sold as agents for the plaintiff; whereas the plaintiff, to sustain his action, must make out that the defendants purchased of him as principal. As to the alleged custom, I do not believe that, as between a principal and his own agent, it exists in point of fact: and the finding of it, if it applies to such cases, must, I think, have been founded *upon a confused notion of the law. But, sup- [*1009 posing it to exist, and to be extensive enough to apply here, and to show that the defendants bought of the plaintiff as principal, it contradicts the writing, which states that the defendants sold for the plaintiff as agent; and that writing is the foundation of the action. I will add, though I am conscious of the slight value of the remark, that this is the first time I have ever heard or read of law or custom making an agent, not del credere, answerable to his own principal for not disclosing the person to whom he sold, there having been no request by his principal for such disclosure. Further, I beg to observe that *Wilson v. Hart*, and the class of cases to which it belongs, are, in the above view of the case, wholly and so obviously inapplicable that I forbear from any remark upon them.

I therefore think the judgment ought to be reversed.

CROWDER, J.—I think the note signed by the defendants below (coupled with the evidence of the custom) was sufficient to satisfy the requirements of the 17th section of the Statute of Frauds. It appears,

(a) 7 E. & B. 266 (E. C. L. R. vol. 90).

from the statement of the case, that the plaintiff below had employed Messrs. Thomas & Moore, brokers in London, to sell the oil in question for him, and that one Shenk had employed the defendants below, who were also brokers, to buy oil for him; and that the dealing in question was between the brokers, without disclosing the names of their principals. The note first put in ran thus, "Sold for Thomas & Moore to our principal," and was signed by the defendants below; and this note was
 *1010] handed by them to Messrs. Thomas & Moore. There was also a contemporaneous note put in afterwards, signed by Thomas & Moore, and sent to the plaintiff below, which ran thus: "Sold to Dale, Morgan & Co., for account of Mr. Charles Humfrey," &c. Now, looking at the two notes together, it is quite clear that the transaction was one of sale and purchase, conducted between the two brokers for their respective principals, whose names were not disclosed. And, according to the custom proved at the trial, the transaction in fact amounted to a sale by Messrs. Thomas & Moore to Messrs. Dale & Co., the defendants below. But it is said the note signed by the defendants below is not a sufficient memorandum of the bargain to satisfy the Statute of Frauds. It is true the words are "Sold for Thomas & Moore to our principals;" but that is equivalent to "Bought of Thomas & Moore for our principals." For, as between Thomas & Moore and the defendants, according to the custom, it was a sale to the defendants, their principals being undisclosed. And a sale "*for* Thomas & Moore," by the defendants to themselves, is in reality a purchase by them from Thomas & Moore. When the plaintiff is made acquainted with the contract which his brokers have entered into for him, he may step in and sue upon it. First, then, it appears to me that the bargain was in effect one which made the defendants below personally liable to be sued upon it. And, secondly, that the note signed by them was a true memorandum of such bargain. The real bargain was between the brokers, upon which the plaintiff below, the principal of Thomas & Moore, now sues the defendants below, and, as I think, may well maintain this action. The judgment ought therefore, in my opinion, to be affirmed.

*1011] *MARTIN, B.—This is an appeal from a judgment of the Court of Queen's Bench in favour of the plaintiff below. The declaration alleged that the defendants bargained for and bought of the plaintiff, who, at their request, sold to them, ten tons of linseed oil, at a certain price and upon certain terms (not material), treating the defendants as vendees of the oil. The plea was that the defendants did not bargain and buy of the plaintiff the said linseed oil or make the said contract as alleged. The facts, as stated in the case for our judgment, are very clear and simple.

The plaintiff had employed Messrs. Thomas & Moore, who were London brokers, to sell the oil. A Mr. Schenk had employed the defendants, who were also London brokers, to buy oil for him. The dealing in question was between the brokers, without disclosing the name of their principals; and it is quite clear that the two brokers met and agreed upon the sale as opposed contracting parties. The case thus proceeds. In order to prove the alleged contract, the plaintiff gave in evidence two notes, of which the following are copies. "75, Old Broad Street, London, 14th August, 1855. Sold this day, for Messrs. Thomas & Moore to our principal, ten tons linseed oil, of merchantable quality,

at 44*l.* per ton, real tare and usual draft: to be free delivered during the last fourteen days February next, and paid for in ready money, allowing 2½ per cent. discount. DALE, MORGAN & Co., brokers. Quarter per cent. brokerage to D. M. & Co." "London, 14th August, 1855. Sold to Dale, Morgan & Co., for account of Mr. Charles Humfrey, ten tons linseed oil, of merchantable quality, at 44*l.* per ton, real tare and usual draft: to be free delivered during the last fourteen days February next, and paid *for in ready money, allowing 2½ per cent. discount. [*1012 THOMAS & MOORE, brokers. Quarter per cent. brokerage to D. M. & Co., a half to us." The first note was signed by the defendants and sent by them to Thomas & Moore. The second note was signed by Thomas & Moore and sent to the plaintiff, and was a copy of an entry signed by them and entered in their brokers' book. No copy of this entry was sent by Thomas & Moore to the defendants. The plaintiff gave in evidence that, according to the usage of this particular trade, whenever a broker purchases or sells oil without disclosing the name of his principal, he is himself liable to be looked to as the purchaser or seller as the case may be; and that it was in accordance with the usual practice in such cases that Thomas & Moore did not send the defendants any copy of their entry in their book. The defendants did not disclose their principal until after the oil had been tendered to them by the plaintiff according to the terms of the contract, and when their principal, Mr. Schenk, had become insolvent.

It was contended at the trial before Mr. Justice Coleridge, that the plaintiff ought to be nonsuited, upon the ground that there was no evidence of the alleged contract to satisfy the Statute of Frauds. The learned Judge directed a verdict to be entered for the plaintiff, giving the defendants leave to move to enter a nonsuit. A rule was obtained accordingly, which was afterwards discharged; and the present appeal has been brought. The judgment in the Queen's Bench is reported in 7 Ellis & Blackburn 266, and is of considerable length.

It is quite clear that the contract in this case was a parol contract. The contract was made by what passed between the two brokers, viz. Thomas & Moore, and the *defendants, and at common law [*1013 would have been a perfectly good contract. But, by the 17th section of the Statute of Frauds, "no contract for the sale of any goods," &c., "for the price of 10*l.* sterling or upwards" (which this was) "shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." There was here no acceptance or part payment; and, to make the contract good, there must be a note or memorandum in writing of the bargain, signed by the defendants or their agents. The Court of Queen's Bench confined their judgment entirely to the note signed by the defendants: they do not at all refer to the note signed by Thomas & Moore: but it has been contended before us: 1st. That the note signed by the defendants is sufficient to satisfy the statute: 2d. That the note signed by Thomas & Moore is sufficient to satisfy the statute; and 3d. That both notes are to be read together, and that, taken together, they satisfy the statute. The last point was not much pressed;

and it seems to me clearly not maintainable. The case is not one of ordinary bought and sold notes. A sale by bought and sold notes, in the ordinary acceptance of the term, occurs when there is one broker acting for both buyer and seller, who makes an entry in his broker's book of the contract, and sends copies of it which are called bought and sold notes, to the seller and buyer respectively; but in this case there were two brokers who acted as opposite dealing parties to each other, and there was no *1014] privacy or connection between the notes signed by *them. In truth they state different contracts. The one states a contract made by the defendants as brokers to their principal for Thomas & Moore. The other states a contract made by Thomas & Moore to the defendants for the plaintiff. So, also, I think the note signed by Thomas & Moore does not satisfy the statute; and for this reason, that there is no evidence whatever in the case that Thomas & Moore were agents of the defendants; and the statute requires that the note or memorandum, if not signed by the party himself, shall be signed by an agent thereunto lawfully authorized. It is sufficient to say that there is no evidence that Thomas & Moore were such agents: but, in my opinion, there was evidence to the contrary; and I think it is impossible to read the case and not see that Thomas & Moore acted as brokers or agents for the plaintiff, and that the defendants acted quite independently of and adversely to them, in the sense in which this word is used in regard to the making of contracts, and as the independent brokers or agents of their principal, Mr. Schenk.

This view of the case was likened to the case of an auctioneer, whose signature in some instances has been held to bind the vendee: but in my opinion, the similitude does not hold good. There can be no doubt that, if there be a sale by auction, and the buyer bids for goods, which are knocked down to him, and the auctioneer thereupon writes down the price and signs the name of the buyer in his book or catalogue, which contains the terms of the sale, of which the buyer had notice, that the signature binds the buyer. The very transaction itself seems to me to give authority to the auctioneer to write down the name of the buyer in the catalogue, and that thereupon it becomes a written memorandum *1015] of the purchase, signed by authority of *the buyer. But the case of *Bartlett v. Purnell*, 4 A. & E. 792 (E. C. L. R. vol. 31), shows that this entirely depends upon the facts of each particular case; and that the auctioneer is not of necessity the agent of the buyer: and, as I have already said, in my opinion there is no evidence that Thomas & Moore were the agents of the defendants; indeed I think there is evidence to the contrary. I therefore think the Court of Queen's Bench was quite right in confining their attention to the note signed by the defendants; and, if it does not satisfy the statute, the contract is not good. As to the 17th section of the Statute of Frauds: whether it ought to be repealed as was recommended by the Commissioners on mercantile law, this is not the occasion to discuss; but, so long as it remains on the statute book, it ought to be construed and applied according to its plain and obvious meaning, like any other enactment; and any application or non-application of it, for the purpose of attaining the justice of a particular case, would, in my opinion, be wrong and most mischievous.

I believe all parties are agreed that, when the contract is originally

made by parol, the note or memorandum in writing must express the real and true terms of the bargain. In *Kenworthy v. Schofield*, 2 B. & C. 945 (E. C. L. R. vol. 9), Mr. Justice Holroyd says it cannot be called a memorandum of the bargain which does not contain the terms of the bargain; and this point has lately been expressly decided in error in the case of *Bayley v. Fitzmaurice*, 8 E. & B. 664 (E. C. L. R. vol. 92). (a) The note signed by the defendants does not in its words state the true terms of the contract at all. The real *contract was a sale by Thomas & Moore, as brokers, for their undisclosed principal, to the undisclosed principal of the defendants, who were also brokers. So far from the words of the writing stating that the defendants were the vendees, they state that they were not, but that their undisclosed principal was the vendee, and they were brokers or agents merely. In truth, the document is in a form perfectly well known and in constant use. It is that of an ordinary sold note when made out by a broker who has acted on behalf of both vendor and vendee. I therefore think the Court of Queen's Bench were right in holding that the custom or usage was essential to the case of the plaintiff. In the judgment, no reference is made to the Statute of Frauds at all; nothing is said in reference to it; but the objection made at the trial was grounded upon it; and, in reality, the whole question depends upon it. If the 17th section of the Statute of Frauds did not exist, or if there had been an acceptance, or part payment, to satisfy it, there would be no difficulty in the case. No objection is made to the usage, as being either unlawful or unreasonable: but I am utterly at a loss to see where there is a note or memorandum in writing of a bargain which shows the defendants to be vendees. The writing shows the contrary; it states that the principal was the vendee, and the defendants brokers. To give effect to the usage, in order to support the declaration, would therefore impose upon the defendants the relation of vendees, which is not shown in the writing, but one which, on the contrary, the writing shows, and truly shows, was contracted by another person, viz., the undisclosed principal; and, if the judgment of the Queen's Bench be right, it would of necessity follow that the same identical words in a *writing would satisfy the statute in one place, or as regards one article of merchandise, say London or oil, where, or in respect to which, the usage exists, and not in another place, or as regards another article, say Liverpool or sugar, where or in respect to which it does not exist. [*1016]

The 17th section of the Statute of Frauds does not necessarily require the contract itself to be in writing; but it does require a note or memorandum in writing of the bargain, signed by the party to be charged or his agent. If the contract be a written one, properly so called, it of course satisfies the statute: but if it be a verbal one (which in the present case it was), a note or memorandum of it, or any other writing, properly signed, containing written evidence of the real contract, is quite sufficient to satisfy the statute. But, according to the authorities, and indeed to good sense, that document must show in writing the real bargain, and a bargain in its written terms, evidencing the contract sought to be enforced, or, in other words, the contract stated in the declaration. [*1017]

(a) In Exch. Ch., reversing the judgment of Q. B. in *Fitzmaurice v. Bayley*, 6 E. & B. 868 (E. C. L. R. vol. 88). The judgment of the Exchequer Chamber has been affirmed in Dom. Proc.; *Fitzmaurice v. Bayley*, Aug. 3, 1860.

Now the note signed by the defendants in the present case is defective, in two particulars: First, it states that the defendants sold for Thomas & Moore; this is not true, and the note therefore does not state the true contract; 2dly, it states that the undisclosed purchaser is the vendee, and therefore disproves the contract stated in the declaration, which alleges the defendants to be the vendees. To admit the usage to prove them to be vendees seems to me to ignore the statute altogether, and to decide that a contract within it is binding upon parties as vendees, when there is a custom or usage to this effect, although there is no note or *1018] memorandum in writing, showing them to be so. It *has been said that, if the contract had been in words, as contained in the writing signed by the defendants, these words with the usage would have established the liability of the defendants upon the present declaration. Without referring to the circumstances, 1st, That the writing does not state the true bargain, and, 2dly, That it is scarcely within the bounds of possibility that the bargain could have been made exactly in these words, and these alone, it seems to me that the answer is, that the statute requires a note or memorandum in writing of the bargain or contract sought to be enforced, and that, in the absence of the other two matters mentioned in the statute, if such a writing does not exist the bargain is not good, and cannot be enforced, upon the simple ground that the statute is not complied with; or, in the words ordinarily used in reference to the subject, the statute is not satisfied.

I must add that, having very carefully and more than once read the judgment in the case in the Court of Queen's Bench, I do not at all concur in the view of the law there stated, as to the admissibility of parol evidence in regard to written contracts.

MARTIN, B., then stated that

CHANNELL, B., was of opinion that the judgment of the Court of Queen's Bench ought to be reversed.

WILLIAMS, J.—In this case the plaintiff seeks to enforce a bargain by which the defendants promised to accept certain oil. The facts are, that the plaintiff authorized brokers named Thomas & Moore to sell some oil, *1019] and one Schenk authorized defendants, who were also *brokers, to buy some oil. The brokers met and made the bargain on behalf of undisclosed principals. The defendants wrote a note in which they stated the contract truly, as being for their principal, without disclosing his name, and signed it as brokers, and sent it to Thomas & Moore; they sent a note to plaintiff in which they stated that they had sold the oil to defendants, without more, and signed it as brokers. It was further proved to be the usage in the city of London (where the matter occurred) that, where a broker makes a contract without disclosing his principal, he is himself liable to be looked to as the purchaser or seller.

On this evidence two objections have been taken to the plaintiff's right to recover. The first was, that the usage ought not to be imported into the contract, because it conflicts with the terms of it. As to this I agree entirely with the judgment of the Court of Queen's Bench that the objection cannot be sustained. The second objection, and that mainly relied on in the argument before us, was, that there was no writing sufficient to satisfy the Statute of Frauds. It may be observed that the contract, in fact, was a parol contract, and would have been

good at common law. The note written by the defendants was not sent in pursuance of any compact so as to constitute the contract. Nevertheless it is a sufficient note or memorandum of the bargain, to satisfy the statute, if it duly states in writing the contract sought to be enforced. The objection is that it does not duly state it, but, in truth, states a different one; for that the contract it states is, that an undisclosed principal is the vendee, and not the defendants, which is the truth: consequently it was argued there is no writing which proves the contract stated in the declaration. But, if this argument were well founded, it *would go to prove that the Statute of Frauds excludes parol [*1020 evidence to show that one or both the contracting parties to an agreement for the sale of goods were agents for other persons, and acted as such in making the contract. But, since the case of *Wilson v. Hart*, 7 Taunt. 295 (E. C. L. R. vol. 2), it has been settled that such evidence is admissible, so as to give the benefit of the contract to the unnamed principal, or to charge him with liability thereon. So parol evidence has been admitted to show that he who, on the face of the contract, appears to be the agent of an unnamed principal is, in truth, himself the principal: *Schmaltz v. Avery*, 16 Q. B. 655 (E. C. L. R. vol. 71); *Carr v. Jackson*, 7 Exch. 382.† In the present case the usage (if it be necessary to resort to it) shows that the plaintiff had a right to treat the case as if the defendants were the principals who had described themselves as agents.

I am therefore of opinion that the judgment ought to be affirmed.

WILLIAMS, J., then read the judgment of

COCKBURN, C. J.—I am of opinion that the decision of the Court of Queen's Bench, in this case, should be affirmed. The action was for the price of linseed oil bargained and sold by the plaintiff to the defendants. The plea denied the bargain and sale. The plaintiff had employed Thomas & Moore, brokers, to sell the oil for him. They again, had employed the defendants for the like purpose; and the latter, being also employed by one Schenk to buy oil, signed a note in these terms: "Sold this day, for Thomas & Moore to our *principal*, 10 tons of linseed oil" (being the oil in question). The *plaintiff adduced [*1021 evidence to show that, by the custom of the trade, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser. Two objections were taken before us, as in the Court below, to the verdict entered for the plaintiff: 1st, that the evidence of usage was not admissible to vary the terms of the written contract; 2d, that, a written note of the contract being required by the Statute of Frauds to bind the defendants, this requirement was not satisfied by a memorandum signed by defendants as agents, though for an unknown principal. As regards the first of these objections, I am clearly of opinion that, as the evidence was offered, not to vary, but simply to explain, the terms of the contract, it was admissible on the principle on which evidence of the usage of particular trades has, in so many other instances, been admitted. The elaborate reasoning on this subject contained in the judgment of the Court of Queen's Bench appears to me so conclusive that, if any doubt could have before been entertained, it is thereby entirely removed; and I think it unnecessary to do more than express my entire concurrence in the language and conclusion of the judgment referred to. As regards

the second objection, I am of opinion that there is a sufficient memorandum of the contract to satisfy the statute. I am of opinion that, where, either by any rule of law, or by the usage of any trade, the terms of a contract acquire a particular meaning, the contract must be taken to express that meaning, as much as though it had been set forth in extenso; and I hold that this obtains as much for the purpose of satisfying the statute as for that of establishing the contract independently of the statute. That this is so when the terms of a contract *1022] acquire a *particular effect, other than they would *primâ facie* import, by virtue of some rule of law is, I think, too clear to admit of doubt, or to require argument; nor, as it appears to me, is the difficulty greater where the particular signification is shown to attach to the terms of the contract by the usage of trade. For it must be remembered that the principle upon which evidence of such usage is admitted is that, as between those who are parties to the contract and conversant with the terms used, those terms as clearly imply the particular meaning as though it had been set forth in extenso; and, if this be so for the purpose of showing the effect and extent of the liability, it must equally be so for the purpose of satisfying the statute; and to hold otherwise would lead to consequences altogether inconvenient and absurd; for it would follow that in no case in which a written contract was required by the Statute of Frauds could evidence of the usage of trade be admitted—a doctrine never dreamed of in the numerous cases in which such evidence has been admitted. Now, according to the authorities cited on the argument, the legal effect of a contract entered into by a person as agent for an undisclosed principal is to bind the agent as principal, if the party with whom the contract is made thinks proper to sue him. Besides which, in this case, independently of any rule of law, the like effect is given to the contract by the usage of the particular trade. The memorandum must therefore be read as though the defendants, while signing as agents for an unknown principal, had in terms declared that in the event of the vendor not discovering the principals, or preferring to hold them liable, they would be liable as principals; for this liability is tacitly included in the terms used: and *1023] I think, as I have *before explained, that, if this holds (as it undoubtedly does) for the purpose of ascertaining the liability of the defendants, independently of the statute, it equally holds for the purpose of satisfying the statute. It may further be observed that, unless the foregoing conclusion were sound, in no case could an unnamed principal be sued on such a contract, or a party purporting to sign as agent, but being in fact the principal; nor, on the other hand, could an unnamed principal take advantage of such a contract: yet the contrary is well established by authority and precedent. On these grounds I am of opinion that the decision of the Court of Queen's Bench was right, and that the verdict ought not to be disturbed.

WILLIAMS, J., then stated that

POLLOCK, C. B., was of opinion that the judgment of the Court below ought to be affirmed. Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

CHARLES ARTHUR HEATON ELLIS, Appellant, *v.* RICHARD NICHOLSON, Respondent. *July 5.*

THIS case, decided in the Court of Exchequer Chamber on appeal from the Court of Queen's Bench, is reported, *antè*, p. 283.

*IN THE EXCHEQUER CHAMBER. [*1024

The Mayor and Assessors of the City and Borough of ROCHESTER
v. The QUEEN. *July 5.*

(In the Matter of the Parish of ST. NICHOLAS.)

Mandamus directed to the Mayor and assessors of R., a borough within the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, comprising several parishes. It contained suggestions that, at the court holden in October, 1856, before the Mayor and assessors for the revision of the burgess lists of that year, the Mayor and assessors refused, for insufficient reasons, to revise the lists. Mandatory part commanding the Mayor and assessors to hold a court and revise the list for the parish. The writ was tested in January, 1857. There was an insufficient return, and a demurrer thereto. The Court of Queen's Bench having awarded a peremptory mandamus:

Held, on error, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the mandamus was properly directed to the existing Mayor and assessors to hold the Court, and revise the list of the past year.

By Pollock, C. B., Martin, B., and Willes, J.; *dissentientibus* Williams and Crowder, Js.

THIS was a writ of mandamus, tested on 26th January, 1857. The writ contained suggestions that the Mayor and assessors, in October, 1856, in the court then holden, refused, for insufficient reasons, to hear objections to persons whose names were on the burgess list of the parish for that year. It commanded the Mayor and assessors of the city and borough of Rochester immediately to hold a court and hear the objections. To this there was a return by the Mayor that he was not the same person who was Mayor when the court was holden in 1856, and was willing to obey the writ if he lawfully could hold the Court; and a return by one of the assessors that he was advised that he could not hold the court by law. To these returns was a demurrer.(a)

*The argument below is reported in *Regina v. Mayor of Rochester*, 7 E. & B. 910 (E. C. L. R. vol. 90), where the record [*1025 in two of the cases is set forth at more length.

The Court of Queen's Bench having awarded a peremptory writ of mandamus, the assessor suggested that there was error on the record, which suggestion was denied.

The case in error was argued by Sir F. Theigier for the appellant in Hilary Term,(b) and in Easter Term, 1858,(c) by Hugh Hill for the Crown, when *Petersdorff* was heard in reply.

The greater part of the argument was as to the construction of stat.

(a) There were two other writs of mandamus, to which there were similar returns, and pleadings raising substantially the same point. They were not separately argued.

(b) On 22d January, 1858.

(c) On May 3d, 1858.

5 & 6 W. 4, c. 76, and did not, in substance, differ from that in the Court below, reported in *Regina v. Mayor of Rochester*. Sir *F. Thesiger* commented on *Rex v. Sparrow*, 2 Stra. 1123, and *Regina v. The Mayor of Lichfield*, 1 Q. B. 453 (E. C. L. R. vol. 41); *Regina v. Mayor of Harwich*, 1 E. & B. 617 (E. C. L. R. vol. 72); *Bowman v. Blyth*, 7 E. & B. 26 (E. C. L. R. vol. 90). *Hill* referred, in addition, to *Regina v. The Justices of the West Riding*, 5 Q. B. 1 (E. C. L. R. vol. 48); *Rex v. The Mayor of Norwich*, 1 B. & Ad. 310 (E. C. L. R. vol. 20); *Regina v. The Vestrymen, &c., of St. Pancras*, 11 A. & E. 15 (E. C. L. R. vol. 39); *Rex v. The Mayor, &c., of Carmarthen*, 1 M. & S. 697 (E. C. L. R. vol. 28); Willcock On The Law of Municipal Corporations, sects. 51, 55, 56, and 61; 1 Rol. Abr. 513, *Corporation* (G) pl. 5.

Cur. adv. vult.

The learned Judges, not being unanimous, now delivered judgment seriatim.

*1026] **WILLES, J.*—I incline to think that the judgment of the Court of Queen's Bench ought to be affirmed.

In the course of the argument I entertained, and still entertain, considerable doubt of the propriety of that judgment; but I likewise entertain a strong feeling of reluctance to overrule the decision of the Court of Queen's Bench upon a subject peculiarly within the province of that Court, more especially when there is the authority of Lord Tenterden in *Rex v. The Mayor of Norwich*, speaking of the doctrine as if familiar to his mind, in favour of the course taken; which, however questionable I might have thought it had the matter been *res integra*, I think I ought not now to overrule.

I think the safer course is to affirm the judgment.

CROWDER, J.—I think our judgment ought to be for the plaintiff in error in this case. The Mayor and assessors are directed by this mandamus to hold a court not authorized by any Act of Parliament, and to do a judicial act not imposed upon them by any statute or by the common law. By the 18th section of stat. 5 & 6 W. 4, c. 76, the Mayor and assessors, to be chosen annually in every borough, are directed to hold an open court within their borough, for the purpose of revising the burgess lists, at some time between the 1st and 15th days of October in every year. By the 19th section, every Mayor, holding such court for the revision of the lists, shall have power to adjourn the same from time to time, so that no such adjourned court shall be held after the 15th day *1027] of October in any year. And the Mayor and assessors shall, upon the hearing in open court, determine upon the validity of the claims or objections. The court, therefore, for revising the burgess lists of each year is limited by the statute to be holden not later than the 15th October, with an express prohibition from adjourning beyond that day. By the 48th section a penalty of 100*l.* is imposed upon the Mayor and assessors if they neglect their duty. It seems clear, therefore, that the only court for revising the burgess lists of each year, authorized by the Act of Parliament, is a court which must be holden, at latest, on the 15th October in each year, by the Mayor and assessors for the then current year. In the case now before us the Mayor and assessors for the year 1856 had neglected their duty, and refused to revise the burgess lists of that year. The writ of mandamus was issued, in Hilary Term, 1857, to compel the newly-elected Mayor and the old

assessors to hold a court in January, 1857, to revise the lists of 1856. No such court is contemplated by the statute; and no machinery is given therein for its sitting to transact any such judicial business, or even for its sitting at all. The only judicial business which the assessors could transact under the statute was the revising of the list of 1856, associated with the late Mayor, before the 15th October, 1856: and the only judicial business, relative to the revision of burgess lists, authorized to be transacted by the Mayor against whom the mandamus issues, is the revision of the lists of 1857, associated with the assessors to be elected in March, 1857, sitting in a court to be holden between 1st and 15th of October, 1857. The former Mayor and existing assessors may be punished, under the 48th section, by the penalty of 100*l.* for refusing to revise the burgess lists of 1856: *but I see no authority whatever in the Court of Queen's Bench to cause a new court to sit [*1028 in order to accomplish that object, and to punish the members of it by attachment if they do not. No case decided after argument has carried the power of the prerogative writ of mandamus to the extent of creating a new court to be held by associating persons together for judicial purposes, not so associated by statute or common law. Before stat. 7 W. 4 & 1 Vict. c. 78, no power existed, by mandamus or otherwise, to obtain the admission of a burgess on the roll, whose name had been improperly rejected by the Mayor and assessors at the court of revision. By sect. 24 of that Act this mischief is remedied by express words of the Legislature. By the present writ of mandamus the Court of Queen's Bench seeks to apply a remedy, in the case of refusing to revise, similar to that which the statute of 7 W. 4 & 1 Vict. c. 71, has applied to the improper rejection of a burgess on the list. It seems to me that no such power exists by law in the Court of Queen's Bench, and that the remedy for the evil must be obtained from the Legislature. Many cases were cited to show that the words of sect. 18 of stat. 5 & 6 W. 4, c. 76, are only directory. But the language of the 19th section expressly limits the holding of the court to the 15th October, at latest, and without power of further adjournment. The case lately decided in the Exchequer Chamber of *Bowman v. Blyth*, 7 E. & B. 26 (E. C. L. R. vol. 90), is strong to show, by analogy, that the language of those sections is imperative, and not merely directory. Cases have been cited in which it has been held that, where justices of the peace are directed by statute to do an act at a *given time, and omit to do it, a mandamus will issue compelling them to do the act at a subsequent time, nunc [*1029 pro tunc, on the ground that the statute was merely directory. But those cases seem to me to have no bearing in principle upon the case at bar. Other cases have been cited, equally inapplicable, I think, in which a mandamus has been issued to the Court of Quarter Sessions to enter continuances and hear an appeal which had been improperly rejected at a prior Sessions; for, in these cases, if the appeal had been received at the former Sessions, it might have been duly adjourned over to the following Sessions, at which the mandamus compels the justices to hear and determine it. But the present defendant below, the Mayor for 1857, could in no way whatever have legally cast upon him the duty of revising the lists of 1856. It is not the same court, or an adjournment of the same court, for the same purpose. No continuances from the court holden in October, 1856, could be ordered to be entered; because

no power of adjournment beyond the 15th October exists under the statute. In all the cases cited, of mandamus to Quarter Sessions to hear appeals, the thing ordered to be done might have been done if proper steps had been taken, first to enter, and then to adjourn, the appeal; but here no step could have been legally taken to give power to the Mayor for 1857 to revise the burgess list of 1856. It seems, therefore, nothing less than positive legislation to call upon him by mandamus to do so. Although it may be very inconvenient that, by the default of the Mayor and assessors of any given year, a whole parish should be disfranchised, it would, in my opinion, be much more so, that the prerogative writ of mandamus should be arbitrarily and illegally issued, *1030] even with the good intent to remedy a great *evil. The precedent might be dangerous if followed in more important cases.

As I can find no authority by statute or common law for the substitution of the court, which the mandamus requires to assemble, in lieu of that which ought to have assembled in October, 1856, to revise the burgess lists of that year, I think this mandamus cannot be sustained, and that the judgment ought to be reversed.

MARTIN, B.—This is a writ of error from the Court of Queen's Bench complaining of a judgment on a writ of mandamus. The writ stated that the city and borough of Rochester was a borough mentioned in the schedule to the Municipal Corporation Act, and the parish of St. Nicholas a parish within it: that, on the 15th September, 1856, one William Lucas was on the burgess list of the said borough, and that one Edward Aldersley and several other persons were also upon it: that W. Lucas, after the 5th and before the 15th September, objected to Edward Aldersley and the several other persons as persons not being entitled to have their names retained on the said burgess list, and gave the town clerk notice of his objection in due legal form, by leaving the same with a man servant of the town clerk at his residence in the said city and borough, and also gave to Edward Aldersley and the several other persons due notice of his objections. That, on the 13th October, 1856, a court was duly holden for revising the burgess list before the Mayor and assessors; and that the notices of objection were then produced by the town clerk, and it was objected that they had not been delivered personally to the town clerk; and thereupon the Mayor and assessor refused to hear the objections: by means whereof Edward *1031] Aldersley and the *several other persons were wrongfully enrolled on the burgess roll. The writ commanded the Mayor and assessors to hold a court and revise the burgess list so far as related to the names of Edward Aldersley and the several other persons.

The Mayor returned that he was not Mayor at the time when the court was holden for revising the burgess list, nor was the court holden before him, but that he was first elected Mayor after that time. Thomas French, one of the assessors, returned that he was advised that he was not bound by law to hold a court, as ordered by the writ. The other assessor returned that he was willing to obey it. The Court of Queen's Bench were of opinion that the returns of the Mayor and of Thomas French were bad, and awarded a peremptory mandamus: upon this error has been brought.

We are of opinion that the judgment of the Court of Queen's Bench was right, and ought to be affirmed. It seems to us that *Rex v. Spar-*

row, 2 Strange 1123, and *Rex v. The Mayor of Norwich*, 1 B. & Ad. 310 (E. C. L. R. vol. 20), are authorities upon the point, and that the principle of those cases establishes the doctrine that the Court of Queen's Bench ought to compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of them has passed; and, if the public officer to whom belongs the performance of that duty has in the mean time quitted his office and has been succeeded by another, we think it is the duty of the successor to obey the writ, and to do the acts (when required) which his predecessor has omitted to perform; and we think all statutes are to be read with reference to this known, acknowledged, *recognised, and established power of the Court of Queen's Bench to superintend and control [*1032 inferior jurisdictions and authorities of every kind. So reading this statute, we think it sustains the judgment of the Court of Queen's Bench as much as if express words were found in it directing what that Court has ordered.

We therefore attach no importance to the circumstance that the Mayor came into office after the time when the Municipal Corporation Act directed the court to be holden. He is a public officer, and, as Mayor, is the proper person to perform this public duty, and therefore ought to perform it. We agree with the opinion of Lord Ellenborough, as expressed on a subject somewhat similar in *Rex v. The Justices of Denbighshire*, 4 East 142, that common sense requires that, if the burgess list of a borough be not properly revised at the proper time, it should be done afterwards. But, were there no authority upon the subject, we should be prepared, upon principle, to affirm the judgment of the Court of Queen's Bench. That Court has power, by the prerogative writ of *mandamus*, to amend all errors which tend to the oppression of the subject or other misgovernment, and ought to be used when the law has provided no specific remedy, and justice and good government require that there ought to be one for the execution of the common law or the provisions of a statute: *Comyns's Digest, Mandamus* (A). This is the purpose for which the writ has been used in the present instance; and, were there not this remedy, it would be in the power of the mayor and assessors, from mistake, or ignorance, or corruption, to disfranchise any borough or to outnumber the lawful burgesses, by placing upon *the burgess roll any number of persons having no legal right [*1033 to the franchise. It was said that the Mayor and assessors were subject to an indictment for a corrupt exercise of their authority. This no doubt is true: but the judgment on the indictment, though it may punish the guilt, cannot redress the wrong; and such a proceeding is wholly inapplicable to a case of error in judgment or mistake in fact.

In our opinion, the want of such remedy would be inconvenient to the subject and injurious to the community. Members of municipal corporations would be deprived of their rights; and the public would lose the advantages to create and secure which those rights were conferred. Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable. For these reasons, we think the judgment of the Court of Queen's Bench ought to be affirmed.

This is to be considered as the joint judgment of the Lord Chief Baron and myself.

CROWDER, J., then read the judgment of

WILLIAMS, J.—I am of opinion that the judgment of the Court of Queen's Bench was wrong. I think that Court had no power to issue the mandamus.

That writ cannot impose a new duty or create a fresh power. It can only command that already imposed duties shall be performed, or that already created powers shall be exercised. Thus in 5 Bac. Abr. 258 (7th ed.), tit. *Mandamus* (A), it is laid down concerning this writ *as follows, viz.: "It is now an established remedy, and every day made use of, to oblige inferior courts and magistrates to do that justice, which," *without such writ*, "they are in duty, and by virtue of their offices, obliged to do."

In the present case, looking at the Municipal Corporation Act (5 & 6 W. 4, c. 76), on which the question turns, it appears to me plain that no duties or powers whatever are imposed or conferred on the Mayor and assessors who were in office in January, 1857 (on the 26th day of which month the mandamus is tested), with respect to the revision of the lists which took place, or ought to have taken place, in October, 1856. This is demonstrated, in my opinion, as well by the general scheme of the Act, as also particularly by the 48th section, which enforces the performance of the duties by the imposition of penalties for the neglect of them on "any mayor, alderman, or assessor of any borough *who shall be in office at the time herein appointed for the revision by them of the burgess list,*" &c. How then can the Court of Queen's Bench impose on those who were not in office at the appointed time a duty, or confer on them a power, which the Legislature has not thought proper to impose or confer?

The principle on which the judgment of the Court of Queen's Bench is founded appears to be, that the statute may be regarded as only directory in respect of the limits of time within which the revision is to take place; and that, even if it were otherwise, still the Court had power, in furtherance of justice, to command the revision to take place at a period beyond those limits; and that the Mayor and assessors to whom the mandamus is directed, although not a corporation, *"*constitute a standing and perpetual tribunal*" (a) within the borough, the existing members of which are competent and bound (if the Court of Queen's Bench shall so command them) to execute such duties as the former members of it were bound, but have neglected, to perform.

But what is there in the language of the statute, or the nature of the functions created by it, to justify such a proposition? The 18th section does not enact generally that the mayor and assessors shall constitute a court of revision, but that for the purpose of revising the lists they shall hold an open court at some time between the 1st and 15th of October in every year, which (by sect. 19) the mayor may adjourn "from time to time, so that no such adjourned Court shall be held after the 15th day of October in any year." It is surely difficult to reconcile this prohibition of an ulterior adjournment with the suggestion that the statute meant to create a perennial court. It is obvious that the machinery which the Municipal Corporation Act has provided for the

(a) 7 E. & B. 925 (E. C. L. R. vol. 90).

revising of the borough lists was borrowed, *mutatis mutandis*, from that provided by the Reform Act (2 & 3 W. 4, c. 45), for revising the lists of parliamentary voters for boroughs. Under the latter the revising harrister is also to hold an open Court within certain limits as to time for revising the lists of voters, which (by sect. 52) he also may adjourn "from time to time," but so "that no such adjourned court shall be held after the 25th day of October in any year." But could it be contended that by these enactments a "standing and perpetual tribunal" is created?

As to the authorities. The case of *Rex v. Sparrow*, 2 Stra. 1123, *appears to have been cited in the judgment of the Court of Queen's Bench, as it was in the argument before us, to show, [*1036 not merely that the enactment in the Municipal Corporation Act as to the time for the revision of the burgess list is only directory, but also that, even if it were otherwise, the Court of Queen's Bench had power to order the thing to be done, though at a period beyond the limited time. But the decision in that case was founded exclusively on the opinion of the Court that the statute under consideration was only directory as to the time when overseers were to be appointed. And the same may be observed as to the case of *Rex v. The Mayor of Norwich*, 1 B. & Ad. 310 (E. C. L. R. vol. 20), which was also cited in the argument before us, so far as relates to the judgments of Littledale, J., and Parke, J.; though certainly Lord Tenterden laid it down that the Court ought to compel an election of guardians in compliance with the statute, even though the clause fixing the time of the election were not merely directory, and notwithstanding that time had already gone by. We were also pressed in the argument with the cases of mandamus to the justices in Quarter Sessions to enter continuances for the purpose of hearing appeals, which, it was said, the justices could not do unless by virtue of the mandamus. But it may be remarked that the object of the Court of Queen's Bench, in directing the entry of the continuances, is to give a semblance of the appeal having been duly preferred. It is, in truth, a shift to which the Court has thought itself justified in resorting, in the exercise of its general superintendence over courts of inferior jurisdiction, in order to get rid of the very *difficulty that [*1037 the Court would have no power to command the Sessions to do the illegal act of hearing an appeal which had not been preferred within the time prescribed by the statute which gives it. In other words, according to the explanation given by Patteson, J., in *Rex v. Hewes*, 3 A. & E. 725 (E. C. L. R. vol. 30), the justices are ordered to hear the appeal and to enter continuances because these are necessary to enable them to hear.

Assuming, however, that, according to these authorities, the Court of Queen's Bench has power to command persons to perform a function which it was their duty to perform, and which they have neglected to perform till it is too late to perform it legally, unless by the aid of a mandamus, no authority has been cited to show that the Court of Queen's Bench has power to command persons to perform a function which it was never their duty to perform at any time whatever. In my opinion the Legislature has omitted to impose on the Mayor and assessors for the time being any duty as to the revision of the burgess list of the preceding year, in the event of their predecessors in office having

neglected to revise them. And, however inconvenient this omission may be, it cannot be remedied by a writ of mandamus(a).

(a) See *Regina v. Overseers of North Bierley*, ante, p. 519.

*1038] *IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Queen's Bench.)

ROBERT THOMPSON, JOSEPH LOWES THOMPSON, and JOHN THOMPSON, Appellants, v. THOMAS DICK HOPPER, Respondent. *July 5.*

Action on a time policy on a ship for a total loss. Plea: that the plaintiffs knowingly, wilfully, and improperly sent the ship to sea in a condition in which it was dangerous to go to sea, and suffered her to remain in that state near the shore, during which time, by reason of the premises, the loss occurred. Issue thereon.

On the trial, it appeared that the plaintiffs personally sent the ship out to sea in an unseaworthy state, and caused her to anchor in the offing in that state. Whilst there she was caught in a storm from seaward and driven ashore. There was evidence justifying the jury in finding that the immediate cause of the loss was not occasioned in any way by the unseaworthiness; and, the jury having found that such was the fact, a verdict was entered for plaintiffs. There was evidence from which the jury might have drawn the conclusion that, though the unseaworthiness was not the immediate cause of the loss, the loss would not have occurred if the ship had been seaworthy when she went to sea. No question as to this was left to the jury.

The Court of Queen's Bench having made absolute a rule for a new trial on the ground of misdirection, holding that the plea was proved, if that misconduct of the plaintiff occasioned the loss, though it was not the immediate cause, the Court of Exchequer Chamber on appeal reversed the decision. Williams, J., Martin, B., Willes, J., and Bramwell, B., holding that the act of the plaintiff in knowingly sending the ship to sea could only affect the liability of the defendant if it was the immediate cause of the loss. Cockburn, C. J., concurring with the majority only on the ground of the special terms of the plea in this case. Crowder, J., dissentiente.

THIS was an appeal from the decision of the Court of Queen's Bench making absolute a rule for a new trial on the ground of misdirection.

The case on appeal set forth the pleadings and the whole of the evidence at the trial.

The declaration contained two counts on a time 'policy on the ship Mary Graham. The material pleas were plea 3 to the first count: That plaintiffs knowingly, wilfully, and improperly sent the ship "out to sea *1039] in an unseaworthy state, and when she was not fitted for the *voyage, and when she was not in a fit and proper condition safely to go to sea, and at a time when it was dangerous for the ship to go to sea in the state and condition in which she then was. And the plaintiffs wrongfully and improperly caused and permitted the ship to be and remain on the high seas near to the sea shore, for a great length of time, in the state and condition aforesaid, and without a master, and without a proper crew to manage and navigate her on the said voyage: during which time the said ship, *by reason of the premises*, became and was wrecked and wholly lost:" and a similar plea to the second count. To each plea was a demurrer, and issue. The pleas were held good on demurrer by the Court of Queen's Bench.(a)

(a) See *Thompson v. Hopper*, 6 E. & B. 172 (E. C. L. R. vol. 88).

The cause came on to be tried, before Bramwell, B., at the Summer Assizes, 1856, at Durham, when a verdict was found for the plaintiffs. The whole evidence was set out in the case on appeal; but it was agreed on the argument that the abstract of the facts given in the report of the case below (a) was sufficiently accurate; except that the jury had found "that the ship was not lost in the state and condition in which she left the harbour;" which finding was not mentioned in the report below, but did not become material. The abstract is therefore not repeated.

In Hilary Term, 1858, (b) *Atherton* argued for the appellants (plaintiffs below), and *Manisty* for the respondent (defendant below). The arguments and authorities sufficiently appear from the judgments.

Cur. adv. vult.

*In this Term, there being a difference of opinion on the Bench, the learned Judges delivered judgment seriatim. [*1040

CROWDER, J.—The question in this case is whether the learned Judge's direction at the trial, upon the issue joined on the 3d plea, was sufficient; and I am of opinion it was not. The validity of that plea as a defence to the action was questioned upon demurrer, and affirmed by the decision of the Court of Queen's Bench. The Court held that unseaworthiness per se was no defence upon a time policy, and that therefore the two first pleas were bad; but the third plea, in addition to the allegation of unseaworthiness, charges the plaintiffs with wilfully sending the ship to sea in an unseaworthy state, and causing her to be detained in such state in a dangerous place for some time, during which time, by reason of the premises, she was wrecked and lost. This plea was held to be a good defence to the action.

Several questions were put to the jury by the learned Judge at the trial; and they found, among other things, that the ship was sent to sea in an unseaworthy state; but that the loss was not occasioned directly or indirectly by the unseaworthiness. The objection to the summing up is, that the main ground of defence in the third plea was not submitted to the jury at all, viz. whether the loss was occasioned by the plaintiffs' wrongful act in sending the ship to sea unseaworthy, and detaining her there in a dangerous position, there being evidence to show that, if she had not been sent to sea unseaworthy, or not kept there unseaworthy near the shore, she would have sailed away, and avoided the perils of the sea which she there encountered, and which were the *proximate cause of her loss. The learned Judge's [*1041 direction to the jury at the trial proceeded upon the assumption that the underwriters would only be excused under the third plea if the loss was proximately occasioned by the ship's unseaworthiness; whereas it seems to me that the substantial ground of defence in that plea is that the loss was occasioned by the wrongful act of the assured in knowingly and wilfully sending the ship to sea in an unseaworthy condition, whereby she was exposed to those perils of the sea which immediately caused her loss, and which, but for that wrongful act of the assured, she would have escaped, although in fact the loss was accidental and unconnected with her state of unseaworthiness. The two cases cited in the judgment of the Court of Queen's Bench of *Davis v. Garrett*, 6 Bing. 716 (E. C. L. R. vol. 19), and *Bell v. Carstairs*, 14 East 374,

(a) See *Thompson v. Hopper*, 6 E. & B. 937 (E. C. L. R. vol. 88).

(b) Thursday, January 21st.

strongly support, in principle, that judgment. As against the underwriters, it can hardly be contended that wilfully sending the ship to sea in an unseaworthy condition is not a wrongful act; and if so, I think the jury ought to have been directed to consider the question whether that wrongful act occasioned the loss proximately by the perils of the sea, not because she was unseaworthy, and so less able to contend against those perils, but because she was, by reason of that wrongful act, placed in a dangerous position and so forced to encounter perils which, had she been in a seaworthy state, she might have entirely escaped. I think there was some evidence to go to the jury upon that question, which therefore ought to have been left to them.

Consequently the judgment of the Court of Queen's Bench should be affirmed.

*1042] ***BRAMWELL, J.**—In this case the first thing to be ascertained is, What is the meaning of the plea on which the question arises. It says that the plaintiffs knowingly and *wilfully* sent the ship to sea in an unseaworthy state and *caused* her to remain near the shore in that state, during which time the ship, *by means of the premises*, became lost. Now I think the meaning of this plea plain: "You, the plaintiff, wilfully caused the loss" by sending the ship to sea in an unseaworthy state, which unseaworthy state caused the loss. It is as though the plea had been: "You wilfully caused the loss, to wit thus, by sending her to sea with a hole in her bottom, or by running her on a rock." This I think the meaning of the plea, and the meaning put on it by the Queen's Bench.^(a) After quoting the plea down to "by reason of the premises" the judgment proceeds, "here we have *personal* misconduct charged on the plaintiffs; which misconduct produced the loss." Afterwards these passages occur: "a loss produced by their own wrongful act. The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being *wilfully* run upon a rock. According to the statement in this plea, the plaintiffs *efficiently caused* the loss by their *wrongful* act." I think this judgment plain to the extent I have mentioned, viz. as interpreting the plea as I interpret it. Then, what was the controversy of fact? It was proved, and not denied, that the ship left the dock in order to take advantage of a high tide, intending to anchor outside while her captain returned to the land in search of some sailors; and that he did so, and had not returned to *1043] the ship when she was *lost*. But the defendants said and proved that the plaintiffs sent the ship to sea in an unseaworthy condition, viz. that her standing rigging was loose, whereby her masts could not bear sails; and so they said that, when the gale came on, owing to her inability to carry sail, she drove on shore. The plaintiffs asserted that the standing rigging had been made fast, and that the loss was attributable to her cable breaking close to the anchor, to her being unable to slip or cut the cable, and to her dragging the cable, and so being unable to sail or leave the shore. The question at the trial was to which of these two causes the loss was attributable: and what was left to the jury was, Did the loss proceed from the unseaworthiness? They found that it did not, but arose from the breaking of the cable, and the

(a) The reference is to the judgment of Lord Campbell, C. J., and Coleridge and Wightman, Js., on the demurrer: 6 E. & B. 191 (E. C. L. R. vol. 88).

inability of the crew to cut or slip it, and its dragging; and that the inability was accidental and arising at the moment, and was not caused directly or indirectly by any unseaworthiness. I do not agree with Mr. *Atherton* that the jury found that the ship was seaworthy; all they found was, that the loss was not owing to any unseaworthiness, and would have taken place from the same cause, whether the ship was seaworthy or otherwise. It is now objected that this finding is insufficient, not on the ground that the reparation of the defective state of the rigging may have delayed the weighing of the anchor till it was too stormy for the crew to weigh or slip it as they might have done in calmer weather, and so the unseaworthy state of the rigging caused the inability to weigh the anchor or slip the cable, and so caused the loss; nor on the ground that had she been seaworthy she would have sailed away sooner, or tried to do so when the storm came; but on a different ground. Whether any such *questions properly arose on the evidence, or whether the plea raised them, or whether the jury has in fact determined [*1044 them, it is not necessary to consider: the objection made is founded on different considerations. That objection is, that it was not left to the jury to say whether or not the moving cause of the loss was the sending of the ship to sea in an unseaworthy state, which rendered it necessary to detain the ship in a dangerous position for a considerable time. That this is the objection appears from the passage in the judgment, (a) "an impending storm overtook her while in the roadstead; and, by an accident *unconnected with the unseaworthiness*, she was wrecked; but if she had been seaworthy when she left the harbour, and had prosecuted her voyage without being brought up and remaining in the roadstead, there is strong reason for believing she would have weathered the storm and reached her port of destination in safety." So that the objection is that (though the jury have found her unseaworthiness did not cause her loss) they ought to have been told, if you find the ship was sent to sea by the plaintiffs in an unseaworthy condition, kept near the shore in that condition because she was in that condition, and was there caught by the storm and lost, you ought to find for the defendants. From that I dissent. 1st. There was no evidence she was kept there because she was unseaworthy; she left the harbour, not because she was unseaworthy, but to save a tide; she stayed where she was, not because she was unseaworthy, but to wait for her captain and some of her crew. Had she been seaworthy she would have left the harbour, anchored and waited just as she did. There was therefore no evidence of that which it is said ought to have been left. 2d. Assuming she *waited [*1045 there because she was unseaworthy, the plaintiffs did not cause her loss by that unseaworthiness; she was lost because she could not weigh her anchor, and would have been lost equally had she been seaworthy, assuming she was not. How, on any theory of causation, can that be a cause with or without which the effect would equally have happened? Suppose she had been struck by lightning while lying there, would the plaintiffs have caused her loss by unseaworthiness? 3d. Supposing it to have been a causing by unseaworthiness, that is to say, supposing her unseaworthiness caused her to be where she was, and so caused her to be exposed to the storm and to cause her loss, it clearly was not a *wilful* causing thereby "by means of the premises." Sup-

posing, I say again, she had been struck by lightning while there, would the plaintiffs have wilfully caused that? 4th. The causing, if in any sense a causing, is a remote causing; it is that the assured sent her to sea unseaworthy, that caused her to remain there, and be exposed to a storm if it came, and so caused her to be lost. The maxim, *causa proxima non causa remota spectetur*, applies. This maxim is recognised, but said not to be applicable; that a remote causing by "*improper conduct*" of the insured is enough. But a fallacy lurks in that word "*improper*." I agree a man shall not take advantage of his own *wrong*. But the phrase contains the same fallacy; and that fallacy is made apparent by the inappropriate use of the maxim "*dolus circuitu non purgatur*." "*Improper*," "*wrong*," and "*dolus*," in the sense in which *dolus* is used in that maxim, are to my mind inappropriate expressions. There was nothing improper, nothing wrong, no *dolus*, in sending the ship to sea unseaworthy. There is nothing wrongful in *1046] sending an unseaworthy ship to sea; though she is insured, there is nothing wrongful in burning her. The wrong is in making a claim founded on such an act. If the insured were to say to the insurer in a time policy, "I have sent my ship to sea with a bad leak; if she founders I shall make no claim on you, but only if she is burned or captured," where would be the wrong? The act does not become wrongful where a claim is founded on it and its consequences; but the claim is. That is not so here. The plaintiffs do not say, By reason of our standing rigging being loose, our ship was lost, and we claim of you. "*Dolus circuitu non purgatur*" means, You cannot fraudulently do that indirectly which you cannot do directly: and I agree that if a man sent his ship to sea with a false compass, in order that she might be lost, and she was lost in consequence, he could not recover. But where is the *dolus* in this case? Where is the intrinsically wrongful act, or the fraudulent intent? I can see neither. In *Davis v. Garrett*, 6 Bing. 716 (E. C. L. R. vol. 19), Tindal, C. J., expressly puts his judgment on the ground that the very deviation was of itself a breach of duty and cause of action, p. 723. In *Bell v. Carstairs*, 14 East 374, the loss was the direct consequence of the continuing act of the insured. In *Montoya v. London Assurance Company*, 6 Exch. 451,† the loss to my mind was by a peril of the sea as much as though the tobacco had rotted. Its physical properties and the action of the sea, as the tobacco was circumstanced, injured it; and so the Court say. Baron Parke, p. 459, is express that the loss "is immediately and directly caused by perils of the sea."

*1047] I am of opinion therefore, 1st, That the *unseaworthiness was in no sense a cause of the loss. 2d. That, if it was, it was not a wilful causing by the plaintiffs. 3d. That, if a cause, it was a remote and not proximate cause. And that, for each and all of these reasons, "the ship was not and could not have been lost by reason of the premises," viz., "by the plaintiffs wrongfully and wilfully sending her to sea in an unseaworthy state," the jury having found as they did. Consequently that the question left to them was proper; and consequently that the judgment should be reversed.

WILLES, J.—I am of opinion that the judgment ought to be reversed. It appears to me to be founded upon a misapplication of the maxim *Dolus circuitu non purgatur*. *Dolus* therein stands for *dolus malus*,

and cannot mean simply any thing which *may* lead to the damage of another: indeed some such acts constitute what has been called *dolus bonus*; and some are *damna absque injuriâ*. Without entering into a discussion of the precise meaning of *dolus* or *dolus malus* in the civil law, I may say that, if *dolus*, in the sense in which it is used in the maxim, can exist independent of evil intention, it cannot so exist without either the violation of some legal duty, independent of contract, or the breach of a contract, express or implied, between the parties. To recognise in a Court of justice *dolus*, or wrong, or misconduct, as a ground of action or defence, apart from these conditions, would be to confound all certainty in the law.

The authorities referred to in support of the judgment appear to me altogether inapplicable.

In *Davis v. Garrett*, 6 Bing. 716 (E. C. L. R. vol. 19), there was a breach of duty, a *breach of contract, viz. a deviation, and [*1048 damage directly traceable to that cause; and it was not proved that such damage would equally have taken place without the operation of that cause.

In *Bell v. Carstairs*, 14 East 374, the loss was the immediate and direct result of the want of proper papers; and it was the duty of the owner of the ship, by the law which authorized its capture, if not by the general maritime law (see *Roccus* (α)), to be provided with those papers; and the want of them was the direct, immediate, and only cause of the loss.

The case of *Montoya v. London Assurance Company*, 6 Exch. 451,† is inapplicable: the real question there was, as is explained by Parke, B., what was the proximate cause of the loss in that particular case.

The maxim and the authorities relied upon being thus explained, I proceed to consider whether the act of sending the ship to sea was wrongful in the sense above indicated. It is not charged in the plea to have been so in any sense except as having directly, if not intentionally, led to the loss of the vessel, and there was no proof of that. I am not aware of any law to prevent a subject of this country from sending a vessel to sea unseaworthy, apart from considerations not suggested by the plea or existing in the facts, such as danger to life and the like, coupled with a guilty knowledge and intention. An indictment in the terms of so much of the plea as was proved would be *frivolous*. There is not a tittle of evidence that the vessel was sent out with any sinister intention, or that the risk to which she was *exposed was not one which a shipowner uninsured might run in good faith to [*1049 expedite a profitable enterprise. And, as to breach of contract, I am of opinion that a time policy contains no implied warranty of seaworthiness, either at the commencement of the risk or at any other time. In this respect I agree in the opinion expressed by Jervis, C. J., in *Jenkins v. Heycock*, 8 Moore, P. C. C. 351. In the absence of fraud or any other violation of the law, the policy ought in this respect to be held conclusive upon the rights of the parties. The jury have found "that the vessel was lost owing to the dragging of the cable, and the inability to cut or slip it, which inability was accidental and arising at the moment, and was not caused directly or indirectly by any unseaworthiness."

(α) *De Assurationibus*, Not. xviii. (p. 154 of Ingersoll's Translation, Manual of Maritime Law, Philadelphia, 1809.

In the absence therefore of any wrong or breach of contract on the part of the plaintiffs, unseaworthiness is no answer.

In effect, there being no violation of the law and no fraud in the assured, an increase of risk to the subject-matter of insurance, its identity remaining, though such increase of risk be caused by the assured, if it be not prohibited by the policy, does not avoid the insurance. I may add that there is a case of *Sillem v. Thornton*, 3 E. & B. 868 (E. C. L. R. vol. 77), which turned mainly upon a question of identity of the subject-matter intended to be insured at the time of the insurance, and may be sustained on that ground, notwithstanding our present decision. That part of the judgment in that case which discusses the above point was not called for by the facts; and if it was intended to negative the proposition just stated, we ought to overrule it.

*1050] The direction of my brother Bramwell was right: and *the judgment holding it incorrect ought to be reversed, and the rule for a new trial discharged.

MARTIN, B.—The judgment which I give is upon the assumption that the judgment of the majority of the Court of Queen's Bench upon the demurrer in this case is right. Upon this assumption I am of opinion that the direction of my brother Bramwell at the trial is unobjectionable, and the judgment of the Court of Queen's Bench directing a new trial ought to be reversed.

The question to my mind depends entirely upon the true meaning of the third plea. It states that the ship was knowingly sent to sea in an unseaworthy state and condition, and when she was not fit to go, and when it was dangerous for her to go. That she was wrongfully caused and permitted to remain in this state and condition upon the high seas near the shore without a master, and without a proper crew, during which time, *by reason of the premises*, she was wrecked and lost. Now I think this plea, like every other writing, ought to be construed according to the plain meaning its words indicate; and that the words *by reason of the premises* indicate that the ship was directly and immediately, by reason of the matter stated in the plea, wrecked and lost; and that, if these matters do not at all, or only remotely, conduce to the loss, the plea was not proved. The evidence was that the ship was wilfully sent to sea in an unseaworthy state and when she was unfit, and it was dangerous for her, to go to sea: that she was anchored near the shore; and that, during this time, and when she was in an unfit state to be at sea, a storm came on; the crew attempted in vain to weigh the anchor; that ultimately the chain cable broke, and forty-five fathoms of cable were *1051] then hanging from her *bow into the sea, and she became unmanageable, and was driven upon the rocks and wrecked. I think the Judge must be taken to have directed the jury to the effect which they found by their verdict, viz., that, if the jury believe the loss was not caused, directly or indirectly, by any unseaworthiness, but that it was owing to the dragging of the cable and the inability of the crew to slip it, which inability was accidental and arising at the moment, that the plea was not proved, and the plaintiff entitled to the verdict. This direction I think right, upon the assumption I have stated, and for the simple reason that, in my opinion, the plea alleges the loss to have been caused by the unseaworthiness, as the direct and moving cause. The

jury are stated to have found in terms that the unseaworthiness did not directly or indirectly contribute or conduce to it. They have therefore negatived the material fact. No doubt if the ship had not been sent to sea she would not have been lost; but this may be said of every loss. Again, if she had been sent out seaworthy, it is probable she would have sailed at once upon her voyage and not anchored; but this is mere surmise: the real answer to both suggestions seems to me to be that they are *causæ remotæ*, whilst by law the *causa proxima* is alone to be regarded. I see nothing in this case to authorize a departure from what I have always understood to be the rule, that *causa proxima* is the matter to be regarded. The verdict may be wrong: but there is an express finding upon the very point which, in my opinion, is the material one. In my own individual opinion, enough of the plea was proved to entitle the defendant to the verdict; for I concur with Mr. Justice Erle that the warranty of seaworthiness applies to a time policy made under the circumstances shown in the pleadings. I gave this question the utmost *consideration in my power in *Gibson v. Small*, 4 H. L. Ca. 353, (a) and expressed my opinion to this effect in my judgment, which is reported in 4 House of Lords Cases, p. 374. To the opinion I adhere. I continue to think it was right. [*1052]

It seems to me, however, that my duty on the present occasion is to confine my judgment to the point upon which the Court of Queen's Bench expressed their opinion on the motion for the new trial.

BRAMWELL, B., then read the judgment of

WILLIAMS, J.—I am of opinion that the judgment of the Court of Queen's Bench ought to be reversed. I think the learned Judge who tried the cause did not misdirect the jury. The imputed misdirection is, that he did not leave it to the jury to find whether or not the moving cause of the loss was the sending of the ship to sea in an unseaworthy condition.

The issue to be tried was joined on a plea which alleged that the plaintiffs knowingly, wilfully, wrongfully, and improperly sent the ship out to sea, and caused and permitted her to remain on the high seas, near the shore, for a long time, during which time, by reason of the premises, she was wrecked and wholly lost. The jury found that she was lost owing to the dragging of the cable and the inability to slip it, which was accidental, and not caused directly or indirectly by any unseaworthiness. It must therefore be taken as a fact that she was not lost by means of any of the premises *alleged in the plea as a proximate cause. But the objection made to the Judge's summing up is, that, inasmuch as perhaps, if the ship had been seaworthy, she would have gone to sea when the storm threatened, and so escaped wreck, the jury should have been asked (which they were not) whether her unseaworthiness was not the remote cause of her loss. It is plain, that, if the ordinary rule of law as between assurers and assured were to be applied, it would have been superfluous to enter into such a speculation, and the inquiry ought to have been confined (as it was confined) by the Judge to the question whether the unseaworthiness was the proximate cause of the loss. The case of *Montoya v. London Assurance Company*, 6 Exch. 451,† has been supposed to be an example of some

(a) In Dom. Proc., affirming the judgment of the Court of Exchequer Chamber in *Small v. Gibson*, 16 Q. B. 141 (E. C. L. R. vol. 71), which reversed the judgment of the Court of Queen's Bench in *Small v. Gibson*, 16 Q. B. 138.

modification of this doctrine. But it will be found, I think, on examining it, that it was, at all events, intended by the Court which decided it to be an example of a direct application of the rule.

The argument, however, on the part of the defendants is, that the plea charges misconduct on the part of the plaintiffs of which they were personally guilty, and avers that the loss was occasioned by that misconduct; and that on such an issue the ordinary rule is not applicable: for that, when the proposition to be maintained is that the loss was caused by the wrongful act of the assured, it is enough to show that such misconduct was the remote cause of the loss. I do not dispute the doctrine that, where a man has been guilty of misconduct in violating a duty he owes to another, to the operation of which misconduct the loss of or injury to the property of the latter is attributable, he cannot excuse himself by the suggestion that possibly if he had not misconducted himself the loss might still have *happened. Such a *1054] doctrine is well established and illustrated by the cases of *Cafrey v. Darby*, 6 Ves. 488, 496, and *Davis v. Garrett*, 6 Bing. 723 (E. C. L. R. vol. 9). But I do not see how it is applicable to the present case; nor do I think that the culpable imprudence of the assured in knowingly sending out to sea the ship in an unseaworthy condition (there being no warranty of seaworthiness) is such misconduct, or such a violation of duty towards the assurer, as to let in the application of the maxim "*dolus circuitu non purgatur*." The reasons for this have been so fully given in the judgments of several of my learned brothers, which I have read, that it is, I think, unnecessary to repeat them, or to say more than that I concur with them.

BRAMWELL, B., then read the judgment of

COCKBURN, C. J.—I am of opinion that the judgment of the Court of Queen's Bench should be reversed. Although it may no longer be open to dispute that there is no warranty of seaworthiness in a time policy, I concur with the Court of Queen's Bench (and for the reasons set forth in their judgment) in thinking that, if a ship, insured in a time policy, is knowingly sent to sea by the assured in an unseaworthy state, and is lost by means of the unseaworthiness, the assured ought not to be allowed to recover on the policy. And, further, I agree that, to constitute a defence in an action on such a policy, it is not necessary that the unseaworthiness should have been the proximate and immediate cause of the loss, provided it can be shown to have been so connected with the loss as that it must necessarily have led to it. It appears to me therefore that, if the fact was that this vessel, in consequence of *1055] her being sent to sea in an unfit *condition, necessarily increased the danger which led to her loss, although at the moment when the danger overtook her an accidental circumstance, and not her unseaworthiness, was the immediate cause of her destruction, this would have afforded a good defence to the action; and I agree that this defence (to support which evidence was given by the defendants) does not appear to have been involved in the question submitted to the jury by the learned Judge, or in the answers given by the jury: such questions and answers being confined to the unseaworthiness as the proximate and immediate cause of the loss. But it appears to me that this defence is not raised by the plea which confines itself to stating the unseaworthiness, &c., and then alleges that *by reason of the premises* the vessel was wrecked and lost. I think that, interpreting this plea

according to the ordinary sense of language, we must take it to mean that the unseaworthiness was the proximate and immediate cause of the loss, which clearly was not the case. If it was intended to allege that the unseaworthiness occasioned the loss by leading to a state of things out of which the loss arose, the facts should have been so pleaded, not as matter of form, but of substance; for it is plain that the plea, in its present form, would by no means inform the opposite party of the nature of the defence intended to be set up.

I am therefore of opinion that the decision of the Court of Queen's Bench should be reversed.

MARTIN, B., then stated that

POLLOCK, C. B., was of opinion that the judgment of the Court of Queen's Bench should be reversed. Judgment reversed.

Whether there is any implied warranty of seaworthiness in a time policy, and, if so, to what extent it is to be carried, are points which are not yet fully settled in this country. In *Pad-dock v. Franklin Ins. Co.*, 11 Pick. 227, which was the case of a policy effected during the course of a voyage, for the residue of its term, it was considered that there was such a warranty, though it was to be construed very liberally, according to the circumstances of the vessel at the time the policy attached. In *American Ins. Co. v. Ogden*, 15 Wend. 532, 20 Wend. 287, it was assumed that such a warranty existed at the commencement of a voyage, during the term insured; but it was held that subsequent unseaworthiness at an intermediate port, was no defence to an action on the policy, where the loss was clearly not occasioned or affected by the intervening unseaworthiness. So in *Capen v. Washington Ins. Co.*, 12 Cush. 517, where the subject was much discussed, the court were of opinion that where a time policy is made *after* a voyage has begun, there is no actual warranty that the vessel was then seaworthy and should continue so, but only an obligation on the part of the insured to keep the vessel tight, staunch, and strong, so far as was in his power. It was therefore held, that though this obligation is not complied with, if there is a

subsequent loss by a peril of the sea, to which the omission to repair does not contribute in any way, the insurers are nevertheless liable. The question arose nakedly in *Jones v. Ins. Co.*, 2 Wallace Jr. 278, where, to an action on a time policy, there were pleas simply alleging unseaworthiness at the commencement of the particular voyage, and also at the commencement of the risk, and the pleas were held bad on demurrer, on the authority of *Small v. Gibson*. In the course of the opinion of the Court, however, it was said: "It may be true, also, that there is in a time policy a warranty of seaworthiness at the commencement of the risk, so far as it lay in the power of the assured to effect it, so that if the ship had met with damage before, and could not have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach."

That in ascertaining the liability of an insurer, the proximate, and not the remote cause of loss, is to govern, is fully recognised by the American decisions. It was so in *American Ins. Co. v. Ogden*, 15 Wend. 532, 20 Wend. 287, and *Capen v. Washington Ins. Co.*, 12 Cush. 517, which were both cases of time policies, where there was existing or subsequent unseaworthiness, which did not, however, contribute to the loss. And it may now be con-

sidered as settled that where there is a loss by a peril insured against, the insurers will be liable, though the remote cause of the loss is the negligence of the master or crew: *Patapsco Ins. Co. v. Coulter*, 3 Peters 222; *Ins. Co. of Alexandria v. Lawrence*, 10 Peters 507; *Waters v. Merchants', &c., Ins. Co.*, 11 Peters 213; *Sherwood v. Gen. Marine Ins. Co.*, 14 Howard 352; *Williams v. Suffolk Ins. Co.*, 3 Sumn. 270; *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477; *Hackens v. People's Mutual Ins. Co.*, 11 Foster 238; *Peters v. Phoenix Ins. Co.*, 3 Serg. & R. 25; *American Ins. Co. v. Insley*, 7 Barr 223; *Georgia Ins., &c., Co. v. Dawson*, 2 Gill 365; *Firemen's Ins. Co. v. Powell*, 13 B. Monroe 311; *Perrin v. Protection Ins. Co.*, 11 Ohio 147; *St. Louis Ins. Co. v. Glasgow*, 8 Missouri 713; *Street v. Augusta Ins. & Bank Co.*, 12 Richard. Law 13; *Henderson v. Western Marine & Fire Ins. Co.*, 10 Robinson, La., 164.

There are some of the earlier authorities which hold, indeed, that where, in the case of a voyage policy, the vessel, by the negligence of the master and crew, leaves an intermediate port in an unseaworthy condition, the underwriters are not liable for a subsequent loss: *Paddock v. Franklin Ins. Co.*, 11 Pick. 227; *Hazard v. New England Marine Ins. Co.*, 1 Sumn. 230; *Stewart v. Tenn. Ins. Co.*, 1 Humph. 242; *Du-puyre v. Western, &c., Ins. Co.*, 2 Robinson, Louisiana, 457. These decisions would probably be considered as applicable to time policies. But they are hardly, if at all, reconcilable with those last cited, notwithstanding the distinction attempted in *Copeland v. New England Marine Ins. Co.*, 2 Metc. 432, between negligence in a master in his nautical capacity, and as agent for the owners in fitting the vessel for sea. Indeed, since the turn given to the authorities by *Sadler v.*

Dixon, 5 Mees. & Welsby 405, 8 Id. 895, in which the point was expressly decided, it can hardly be contended with success, that if the owner has once complied with the warranty of seaworthiness, he can afterwards be affected by the negligence of the master or crew, in any way, where the actual loss is by a peril of the sea.

It must be admitted, however, that unless the implied warranty or obligation of seaworthiness is to be considered as entirely and absolutely inapplicable to time policies, the language of the majority of the Court in the case in the text, carries the doctrine of proximate causes very far. That doctrine is intelligible enough within certain limits. Where a vessel, under a time policy, leaves port in an unseaworthy condition, and is afterwards destroyed by fire, or is taken by pirates; or the unseaworthiness consists in the absence of some article of apparel or furniture, which, under the actual circumstances of the loss, is wholly unimportant, there is plainly no connection of cause and effect which could reasonably affect the insurance. On the other hand, even if there be such a connection of cause and effect perceptible, as where a vessel goes ashore from the negligence of the watch, or takes fire from the careless use of a candle by a seaman, this negligence or carelessness is in no way imputable to the insured, is no breach of any contract or warranty on his part, and, indeed, is an element of causality which he may expect to be relieved against. But where there is not only unseaworthiness, but also a causal connection, more or less clear, between it and the actual loss, as where the insured deliberately sends his ship to sea, or places her in a position of peril, in a condition which unfits her to resist the violence of the elements, and she is in fact lost by the violence of the elements, it seems to be too

much to assert that only the proximate cause is to be looked to. How is it possible in such a case to separate the two causes, and say that if the vessel had been entirely seaworthy, the loss would still have occurred? Does it lie in the mouth of the insured, who has broken his contract or failed in his duty, to make such an allegation? It is this very difficulty, if not impossibility, of distinguishing between these elements of causality, which is one of the chief grounds for the implication of a warranty of seaworthiness in a voyage policy. If, to be sure, as is said by Baron Bramwell, there is nothing wrong in sending a vessel to sea in an unseaworthy condition, but the only wrong is making a claim founded thereon, there is an end to the question. But if, on the ground as well of good faith to the insurer, as of public policy, it is wrong so to do, then, whether the corresponding duty be in the nature of a strict warranty, or only a qualified undertaking, it is submitted that it lies on the insured to show, not merely that possibly or probably the

loss would have occurred, had there been no breach of duty on his part, but that it necessarily must have done so. To leave it as a mere open question to a jury, in this country at least, would be to guarantee a verdict against the insurers, in almost every case.

It is proper, in conclusion, to call the reader's attention to the fact that though the decision in the Queen's Bench, reported 6 Ell. & Bl. 937, is reversed in the case in the text, the doctrines of the majority of the judges of the Exchequer Chamber did not receive the assent of Crompton, J., nor of Cockburn, C. J., who merely concurred in the reversal on a point of pleading. It does not appear whether Chief Baron Pollock agreed with the latter or with the majority on the general question. It follows that, as the Court of Queen's Bench were unanimous, of eleven judges who have altogether heard the cause, six, and perhaps seven, are opposed in opinion to the accidental majority in the Exchequer Chamber.

*IN THE EXCHEQUER CHAMBER.

[*1056]

(Error from the Queen's Bench.)

GEORGE PEMBERTON, Executor of SARAH SHUTER, v. JOHN CHAPMAN, Public Officer of the Union Bank of LONDON.

July 5.

Payment by a debtor of a testator, and delivery by a bailee of chattels bailed by the testator, to a feme covert who is appointed executrix, are valid as against her co-executor, though the husband of the executrix never assented to his wife acting as executrix, and subsequently to the payment, refused to allow her to act, and although on that ground probate was refused to her, if the payment and delivery were made *bonâ fide* at the request of the executrix as such, without knowledge, by the party paying and delivering, of the dissent of the husband, though with knowledge that she was a feme covert. So held by the majority of the Exchequer Chamber, affirming the judgment of the Queen's Bench; Cockburn, C. J., and Bramwell, B., dissenting.

Party in the Court of Exchequer Chamber is to have costs where the judgment below is affirmed.

FIRST count by plaintiff, as executor of Sarah Shuter, for money had and received and lent to the bank in the life of the testatrix. There

was also a count in trover for bonds and securities of testatrix converted by the bank since her death.

Plea 3, to first count: that testatrix, by her will, appointed one Sarah McGill and plaintiff executrix and executor thereof; and that, after the death of the testatrix, Sarah McGill took upon herself the "burthen of the execution thereof; and, afterwards and before action, the said copartnership satisfied and discharged the plaintiff's claim, in respect of the matters herein pleaded to, by payment to the said Sarah McGill as such executrix at her request."

Plea 6, to the whole declaration, averred the appointment of Sarah McGill as executrix, and her taking upon herself the burthen of the execution of the will, as in plea 3, and then proceeded: "and, afterwards and before *action, the said copartnership satisfied and
*1057] discharged the plaintiff's claim in respect of the first count, by payment to the said Sarah McGill as such executrix at her request, and delivered to her as such executrix and at her request the said bonds and securities for money in the last count mentioned; which is the supposed conversion thereof in the last count mentioned, and all which moneys so paid to her by the said copartnership, and bonds and securities for money so delivered to her by the said copartnership, the said Sarah McGill hath duly administered.

Replication 2, to plea 3. That, before and at the time of the making of the last will of the testatrix, and from thence hitherto, the said Sarah McGill was the wife of one Peter McGill, who is still alive; that she was appointed executrix, without the knowledge or consent of the said Peter McGill; and that he never took upon himself, or on Sarah his wife, the execution of the will, and never in any way consented to Sarah his wife taking on herself, or him, the execution of the said will, and wholly dissented therefrom. That Peter McGill never in any manner administered, or consented to Sarah his wife ever in any manner administering, any of the goods and chattels which were of the testatrix to be administered. That, after the death of the testatrix, probate was granted by the Archbishop of Canterbury to the plaintiff alone; that it was always refused to Sarah McGill, although she applied to be joined in the probate; and that the payment by the copartnership was voluntarily made to the said Sarah McGill, without the knowledge or consent of Peter McGill and of the plaintiff, or either of them, the
*1058] copartnership, at the time *the payment was made, well knowing that Sarah McGill was a married woman.

Replication 1, to so much of plea 6 as relates to count 1, similar to replication 2 to plea 3, with the addition of a denial of the averment, in plea 6, that Sarah McGill had duly administered.

Replication 2, to so much of plea 6 as relates to the count in trover, similar to the replication to the first part of that plea, except that an averment that the bonds and securities were delivered voluntarily, and with notice of the coverture, was substituted for the averment that the payment was so made.

Demurrers to each of these three replications. Joinder.

The Court of Queen's Bench gave judgment for the defendant on these demurrers.(a)

Error having been alleged and denied, the case was argued in the

(a) See *Pemberton v. Chapman*, 7 E. & B. 210 (E. C. L. R. vol. 90).

Exchequer Chamber, before Cockburn, C. J., Pollock, C. B., Cresswell, Crowder, and Willes, Js., and Bramwell and Channell, Bs., on 29th April and 1st May, 1857, by Sir *Fitzroy Kelly* for the plaintiff and *G. Rochfort Clarke* for the defendant. The argument was not completed on these days. On 14th June, 1857, the argument was resumed before Cockburn, C. J., Pollock, C. B., Williams and Willes, Js., and Bramwell, Watson, and Channell, Bs., when *Unthank* was, in the absence of Sir *F. Kelly*, heard in reply.

The arguments were, in substance, similar to those in the Court below.

Cur. adv. vult.

There being a difference of opinion on the Bench, the learned Judges now delivered judgment seriatim.

*BRAMWELL, B.—I am of opinion that the plaintiff is entitled to judgment. [*1059]

As a matter of reasoning, the case seems to me clear. The difficulty is supposed to arise from two conflicting rules of law: one, that a feme covert may be appointed executrix; the other, that she cannot act or accept an estate or office except by and with her husband's consent. But the truth is, there is no such conflict, as a little examination of the first supposed proposition will show. It is sufficiently accurate for all ordinary purposes to say that a feme covert may be appointed executrix, or to say that A. may appoint B.; but the appointment is not a constituting of the person as executrix or executor, but is a nomination to that office, acceptance of which is essential to make the nomination effectual. If A. is appointed executor of B., A. must accept the office to make him executor; if A.'s wife is appointed, there must be an acceptance of the office. By whom? The wife alone? It seems to me clearly not: she cannot accept it without her husband's consent. The authorities and reason of the thing are to the contrary. Wms. Exor. 166, 3d ed., (a) citing Godolphin, part 2, c. 10, sect. 2, 3, (b) is express and in point. So also the authorities collected in Wms. Exor. part 3, book 1, c. 4, are conclusive to show that the husband's consent is necessary to all acts of administration; but it is impossible to suppose the wife can accept the office and yet have neither the power nor duty of acting. If she can accept the office, a dilemma is presented to which no answer has been given. If she commits a devastavit she either does it with impunity or makes her husband liable for its consequences, contrary to all analogy. It has been said she commits it with impunity, that the testator has chosen to nominate her, and that no one can object to a payment to his nominee. This answer is full of errors. If I am right in saying the nomination is only effectual if the husband consents, then the nomination is only conditional, and the condition has not been fulfilled. But assume it to be absolute: I deny that the testator has a right to appoint an irresponsible executrix. Suppose he is insolvent. Is it conceivable that any rational system of law will permit him to give his property away from his creditors under the guise of committing its administration to one irresponsible for a breach of duty in the administering? Then it is said the husband may be liable, that a devastavit is a wrong in the wife, and that the husband is liable for it, as for her slanders or batteries. I do not stop to consider whether the first part

(a) See Vol. 1, p. 202 (5th ed.), Part 1, B. 3, c. 1.

(b) Orphan's Legacy, p. 110 (3d ed.).

of this proposition is well founded. Assume it to be a wrong when committed: the husband claims the right to prevent her committing it. He can or he cannot prevent her slandering or beating: if he can, he ought; if he cannot, it is an inevitable mischief: and in either case he must take the consequences. But here he says: "I desire that she may not have the opportunity of doing wrong. I do prevent her. I will not let her administer." Has he not the right to say so? If not, he has not the same right to prevent her committing this as he has to prevent her committing other wrongs. It may be said this reasoning only shows that the husband in this case might have prevented her but did not. But the answer is, that his assent is necessary to her rightful acceptance of the office of executrix. That without that *1061] assent *she may wrongfully administer, no doubt as she might though not named as executrix; that that affords no protection to the defendants who have dealt with her, any more than though she had not been named executrix, though it may possibly give them a cause of action against her and her husband for the wrong done by her false assumption of authority. I say, therefore, the case is in an unanswerable dilemma. It was said it would be very inconvenient if a married woman had to wait for her husband's assent to her administering. But for this the same remedy would be applicable as in other cases where the executor is at a distance. Besides, I do not suppose the law intends that married women executrices live apart from their husbands, or, if they do, that they live nearer to the place where the assets are to be administered, where the husband could administer without consulting his wife: 1 Wms. Ex. 3d ed., p. 167.(a) It was said that here the probate enured to the benefit of all named, and that even now the husband might assent, and his wife and he administer, and that they might have been compelled to be a party to the action. To this there are two answers. The first is, that the question does not arise on the pleadings: the second is, that, supposing the husband and wife could have been compelled to join, a remedy seems given by the writ of summons ad sequendum simul; see Wms. Exors. 3d ed., p. 1467.(b) Whether that is so or not, it is certain that, if the plaintiffs are right in substance, no trick of the pleadings can defeat them. And on this point Mr. *Unthank's* argument and his illustration should be borne in mind. The probate is a mere declaration *1062] *by the Court that the testator has so willed it. Suppose a popish recusant had been appointed executor, must he have joined? Or, in default of doing so, must the estate be uncollected? Then it was said that by the appointment, till the husband dissents, the property vests in the wife. To that I do not agree. In whom does it vest in case of an appointment of an adult male who renounces, whereupon administration testamento annexo is granted to some one else? In the person so named in the will? If so, how is it that he has not to make a conveyance to the administrator, and why is it the administrator can maintain an action for injury to the property done before the date of his administration? Besides, if such a doctrine were true of chattels real and personal, why is it true of a chose in action, which does not of necessity require an owner? It may be said, In whom is the property in the assets where the married woman is appointed? I say, where it is when an adult male is appointed who will not administer, viz., in the

(a) See vol. 1, p. 203, note (c), 5th ed.).

(b) See vol. 2, p. 1692, note (r) (5th ed.), Part 5, B. 1, c. 1.

Ordinary till the appointment of an administrator, whose title relates back to the death of the deceased sufficiently to enable him to recover in respect of causes of action prior to the letters of administration, though he must wait till they are granted before he commences his action. *Foster v. Bates*, 12 M. & W. 226,† is in point. The authorities seem decisive that the husband's consent is necessary to the wife acting; Yearb. Hil. 2 H. 7, fo. 15, A. pl. 28, confirmed 6 Mod. 93; (a) 1 Siderfin 188, (b) 2 W. Blackstone 801; (c) *Russel's Case*; (d) and numerous others. As to the authorities to the contrary, Com. Dig. *Baron *and Feme* (P 3.), must be read in connection with what he says [*1063 in *Administration* (D), to which he refers; and then it appears he means that probate granted to her is valid, whether the husband has consented or not; as to which there can be no doubt, on the presumption the Court acted on the husband's assent. See *Adair v. Shaw*, 1 Sch. & Lef. 266.

It remains to consider the pleadings. The third plea is clearly good; it is payment to one of several executors. But to my mind the replication is more than good; for it not only alleges that the husband did not consent, but it adds that he dissented; so that, supposing that there is any presumption of assent by the husband (which I do not think there is, certainly not unless he or the wife are parties to the question), that presumption is rebutted. The observation, however, of the Court of Queen's Bench, viz., that it must be assumed the payment was before the dissent, I think well founded. For similar reasons I think the sixth plea good, and also the second replication to it.

With respect to the judgment of the Court below, the paragraph (e) beginning "the right of an executor" is no doubt strictly correct: but it must be borne in mind that it applies to the case of a person who has consented to act, and therefore in the case of a wife assumes (I say) her husband's consent. So the first part of the next paragraph I wholly agree to: but, with great respect, I ask, What authority is there for the position implied in the expression that an executrix cannot, without her husband's assent, take upon herself the *general* administration of the estate? I say she cannot, without that assent, administer *at all*, except tortiously. It is said *there is no authority or principle of law [*1064 to warrant the conclusion that a bonâ fide payment to a feme covert named executrix, the husband not assenting, is void; but is there any to show it is valid? The suggestion, that if he afterwards assented it would be good, would be equally true if he had been named executor, and the wife not, and the payment had been to her. In the next paragraph Mrs. McGill is called the executrix. I say she never was. The question of hardship is scarcely worth adverting to: but the defendants might have protected themselves against paying twice: as it is, there is no protection for the estate receiving once. And, after all, the hardship is only that which arises in other cases where parties deal with a married woman incompetent on that account to act. No doubt it is not desirable to multiply the number of such cases; and I only refer to them to show there is no novelty in the hardship now complained of.

BRAMWELL, B., then read the judgment of

COCKBURN, C. J.—I am of opinion that the judgment of the Court of

(a) *Jenkins v. Plombe*.

(b) *Cookes v. Bellamy*.

(c) *Thrustout dem. Levick v. Coppin*.

(d) 5 Rep. 27 a.

(e) 7 E. & B. 217 (E. C. L. R. vol. 90).

Queen's Bench must be reversed, on the ground that Mrs. Sarah Elizabeth Shuster McGill, to whom the defendants plead that they made payment as the executrix of the will of Sarah Shuter, to whose estate the money sued for by the plaintiff as executor of such Sarah Shuter was due, was not in point of law her executrix, and consequently that such payment to her affords no answer to the plaintiff's demand.

To constitute an executor two things are necessary: not only the appointment of the particular individual by the testator, but also the *1065] acceptance of the office by *the person appointed. It is true that the executor acquires a right to the goods of the deceased by virtue of the will alone, independently of, and antecedently to, the grant of probate; and it is equally true that his right accrues from the moment of the testator's death. But it appears to me plain that this is only by *relation back from the time of the acceptance* of the executorship to the testator's death; and that, prior to such acceptance, neither the rights or duties of executor could accrue. It can hardly be contended that a testator can, by the mere appointment of an executor, impose the burthen of the office on one unwilling to assume it, or that the estate of the testator would thereby vest in one who repudiated the office and declined to deal with the property, in order to carry out the provisions of the will. But, if this be so, in the view I take of this case there was no acceptance of the executorship by the alleged executrix. An acceptance there indeed was in point of fact, but none in point of law. Mrs. McGill took upon herself, no doubt, to deal with the estate of the testatrix in such a manner as would have constituted an acceptance of the executorship in a person not labouring under a disability to accept it. But Mrs. McGill was a married woman, and, in thus taking upon herself the office of executrix, acted without the assent of her husband. Now, the authorities cited in the course of the argument appear to me to establish conclusively that a feme covert cannot become an executrix without the assent of her husband, express or implied. And, indeed, to hold otherwise would lead to one or other of these startling consequences: either you must set at nought a fundamental principle of our law, that a wife cannot bind her husband in a pecuniary liability *1066] without his consent, or *(as an action could not be brought against the wife without joining the husband) there would be an absolute impunity to the wife in case of a devastavit. Reason, therefore, and authority appear to me to coincide in establishing that a wife, without her husband's authority, cannot take upon herself to act as executrix. There may indeed be cases where the assent of the husband must be presumed, or where the husband, having permitted the wife to act, may be estopped from denying her authority: but no difficulty of that sort arises here; it is expressly averred in the replications, and admitted on the record, that the wife here took upon herself the office of executrix without the assent of the husband. In the absence of such assent Mrs. McGill, though she took on herself to act as the executrix of the testatrix, never was in law the executrix. It follows that a payment made to her on account of a debt due to the estate of the testatrix was not paid to a party authorized to receive it, and affords no answer to the claim of the lawful executor. The reasoning by which the judgment of the Court below is sought to be supported appears to me to proceed on the fallacious ground that, because an executor may, before

probate, proceed to do certain acts, and, amongst others, to collect debts due to the deceased, therefore a married woman taking upon herself to act as executrix, without her husband's assent, may do the same. But in the former case the executor, by taking upon himself so to act, accepts the office and becomes to all intents and purposes executor (although he may require probate as the proper evidence of his character in a Court of law); whereas a married woman cannot, by acting as executrix, accept and take upon herself the office till the assent of the husband is obtained. In *the former case the acts are good [*1067 and valid, though done before probate, because done by a lawful executor; in the latter they are invalid, because done by a person who never was executrix. I am not insensible to the hardship that may be inflicted on a party making a payment under such circumstances bonâ fide to a married woman acting as executrix; but, on the other hand, great mischief might arise from allowing a married woman to deal with the estate of a deceased testator under circumstances where she could not be made responsible; and persons indebted to the estate of a deceased testator may easily protect themselves in paying to a feme covert executrix, by taking care to ascertain that the husband is an assenting party to the payment. But, independently of all argument derived from expediency, I am of opinion that, on reference both to principle and authority, the replications on this record afford a sufficient answer to the pleas; and that our judgment should therefore be for the plaintiff.

WILLES, J.—It appears to me that the judgment of the Queen's Bench ought to be affirmed.

The question is, whether a payment bonâ fide made to a married woman executrix by a person who knew she was married, but not of any other disability, the husband not having authorized her to receive such payment, and having subsequently dissented from her taking upon her the office of executrix, and probate having subsequently been granted to a co-executor and refused to her, operates to discharge the debtor as against such co-executor. I am of opinion that it does. A married woman may be appointed executrix; and, if her husband allow her to act, she is clothed by the will *with all the same powers as if [*1068 she were a feme sole. It is, however, laid down, that she cannot take upon her the office without the consent of her husband, so as to charge him with liability for her acts, and that he may interfere and prevent her from acting as executrix.

This restriction upon the authority of a feme covert as executrix was introduced for the protection of the husband; and it ought not to be extended beyond what is necessary for that purpose. In the present case, as between the testator's estate and the debtor, the debt has been paid to a person appointed by the testator as his agent to receive, and who was capable of being so appointed such agent, either by act inter vivos or by will. The act of receiving the money was not wrongful, and could not by itself in any way affect the husband. The case of an infant, who might at the common law have been executor, furnishes an analogy. His acts in the due course of administration, as, for instance, receiving payment of a debt, were valid: but his acts not in the due course of administration, and by which, if valid, he would become guilty of a devastavit, were void. Here, for aught that now appears, the money

may be forthcoming, and the wife ready and willing to pay it to the co-executor or to the husband, so that the husband could not be made liable, if indeed he could have been so supposing that she had squandered it away. Moreover, the husband may, at some future time, retract his refusal and permit his wife to act as executrix. If that should happen, the payment being now held inoperative, absurd consequences would follow, too obvious to need being pointed out.

It has been suggested, indeed, that the authority of the husband is *1069] given, not merely for his benefit, but also *for the benefit of the estate, and to prevent its being squandered by an irresponsible person. This however is, so far as I am aware, quite novel, and not in harmony with the rest of the law upon this subject. Indeed, there is nothing to prevent a testator from appointing as his executor an insolvent spendthrift, nor to enable the Probate Court to require security before granting probate to such a person. Nor do I see why honest debtors should be made to pay twice over, even for the sake of paying honest creditors, if any there be in this case, once.

I am therefore of opinion to affirm the judgment of the Queen's Bench.

The Lord Chief Baron, and my brothers Martin and Channell, are also of opinion that the judgment of the Queen's Bench ought to be affirmed. My brothers Cresswell and Crowder, so far as they heard the argument, are of the same opinion; and such also is the impression of my brother Williams.

Judgment affirmed.

July 5.

MARTIN, B., at the conclusion of the judgments on this day, stated, as a general rule, that, where the judgments of the Courts below were affirmed in the Court of Exchequer Chamber, they were to be affirmed with costs.

By reason of statutory provisions or otherwise, it is held in several of the United States, that the common law rule is no longer applicable, and that an executor has no power to act until he is duly qualified according to law: *Monroe v. James*, 4 Munford 195; *Mitchell v. Rice*, 6 J. J. Marsh. 625; *Carter v. Carter*, 10 B. Monroe 327; *Robertson v. Gaines*, 2 Humph. 381; *Trask v. Donoghue*, 1 Aik. (Verm.) 373; *Cleveland v. Chandler*, 3 Stew. 489; *Gardner v. Gault*, 19 Alab. 666. executrix or entitled to administration, would be liable for her devastations, he may refuse his consent to her taking out letters: *Carrol v. Cornet*, 2 J. J. Marsh. 195; *Elliott v. Lewis*, 3 Edw. Ch. 40; *Redwood v. Riddick*, 4 Munf. 222; *Ferguson v. Collins*, 3 Eng. Ark. 241. In *Rambo v. Wyatt*, 32 Alab. 363, it was held that a married woman, who had been appointed administratrix while sole, could resign without her husband's concurrence, and thus determine his right of administration.

END OF TRINITY VACATION.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

IN THE HOUSE OF LORDS.

FAITHFUL CROFT v. BENJAMIN LUMLEY, the Right Hon. LORD WARD, SIR RALPH HOWARD, and Others. *June 29 and 30, 1857, and Feb. 15 and April 17, 1858.*(a)

A lease of the Opera House contained covenants by the lessee, (1), that he would not convert the same to any other use than for performing operas, &c., but would use his utmost endeavours to improve the same for that use and purpose; and (2), that he would not grant, let, charge, &c., the boxes for a longer period than one year or season, nor charge nor encumber the theatre, or the term thereof, by mortgaging, or granting rent-charges, or any other encumbrance:—Held (affirming the judgment of the Queen's Bench and Exchequer Chamber), First, that covenant (1) was not broken by the lessee not opening the theatre for two seasons, and that it ought to be limited to keeping the house itself properly decorated and improved, with scenery and all appointments necessary to an opera house, and not that a lessee should be bound, at a loss, to keep it open for theatrical performances.

Secondly (concurring with all the judges attending), that the first part of covenant (2) was not broken by granting, before the close of the current season, a lease of a box for the term of one year, to commence from the first day of the next season.

Thirdly (affirming the judgment of the Exchequer Chamber, which overruled that of the Queen's Bench, and according with the opinions of all the judges summoned, except Crompton, J., dissentiente), that the latter part of covenant (2) was not broken by the giving bonâ fide warrants of attorney, the defeasance of which disclosed that they were given with the intention that judgments should be entered thereon, and that such judgments should be registered, and should stand as securities for debts, upon default in payment of which by a day named execution should issue; although, by the 1 & 2 Vict. c. 110, s. 13, on registration, such a judgment operates in all respects as a charge upon the lease, and also although this might be taken in execution under the judgment confessed.

Aliter, if the intention of the parties was clear and manifest to evade the covenant, and charge the lease in a circuitous manner. Wightman, J., was of opinion that the intention so to do was manifest in this case.

By all the Judges present (though the judgment of the House on the above points rendered it unnecessary to decide the two remaining questions), that a proviso for re-entry, "or if the lessee shall make default in the performance of any other covenants, &c., which on his part are or ought to be observed, performed, or kept," would apply to and forbid the breach of a negative as well as a positive covenant.

Where the lessee tendered rent which had accrued subsequently to breaches of covenant, as rent, but the lessor took it as compensation for occupation, expressly reserving the right of re-entry, it is, by force of the rule, "*solutio accipitur in modum solventis*," a waiver of the

forfeiture in respect of such breaches as were known to the lessor.—By a majority of the Judges, (Crompton, J., dissenting).

Waiver also of known and unknown breaches, where the latter differed not in circumstances from those he knew of—*e. g.* several breaches of the same covenant —Per Erie, J.

Waiver of all the breaches before the accrual of the rent received.—Per Watson, B. But, Per Crompton, J., the receipt of such rent is not necessarily a waiver; but the question is, was it in fact received with an intention to waive, and declare the lease still in force. The rule relied on applies only to the case of two distinct debts or demands, and an appropriation by the payer to one of them.

Seemle, Lord Wensleydale, accord. sed obiter.

This case will be found reported in its previous stages in 4 E. & B. 608 (E. C. L. R. vol. 82); on a preliminary point; the argument and judgment in the Queen's Bench, 5 E. & B. 648 (E. C. L. R. vol. 85); in the Exchequer Chamber, 5 E. & B. 682. In both the courts below judgment was given for the defendant, though the Court of Exchequer Chamber differed from the Court of Queen's Bench, in this, that they were of opinion there was no breach at all of the covenants, which decision rendered any consideration of the waiver unnecessary. The action brought in the court below was one in ejectment by the plaintiff, as lessor, against the defendant Lumley, his lessee, to recover possession of the Opera House in the Haymarket, on the ground of certain acts of the defendant, which, it was contended, amounted to breaches of the covenants in the lease. This was granted in 1815, to last, as to part of the premises, for sixty-six years from September, 1825, and as to part, for fifty-one years from September, 1840. A power of re-entry was reserved in case the rent of 984*l.* 14*s.* should not be paid, &c., "or in case the lessee should, without license, grant away, assign, let, charge, or otherwise dispose of the boxes or stalls of the said theatre," &c., "for any term or number of years whatsoever, or for any longer period than one year or season," &c., "or if the lessee should make default of or in the performance of all or any of the other covenants, grants, articles, conditions, and agreements thereinbefore contained which on his part," &c., "are or ought to be performed, observed, and kept." The covenants alleged to be broken were—"shall not at any time," &c., "convert the said theatre to any other use than for acting," &c., "operas, plays, concerts, balls, masquerades, assemblies, and such theatrical and other public diversions and entertainments as have been usually given therein, but shall and will use his utmost endeavours to improve the same for that use and purpose;" "not to assign any boxes"—in the same words as are contained in the above condition of re-entry—"nor charge or encumber the said theatre, or the terms thereby granted, by mortgaging the same, or granting any rent-charges, or any other encumbrance or encumbrances whatsoever." From the season of 1852, the theatre had not been opened for entertainments of any sort, up to the signing of the special case in May, 1855. As to the breaches of the covenants against assigning, two or three instances relied on in argument will suffice. There were many others. By indenture of the 3d July, 1852, certain boxes were demised to Lord Clanricarde and another for the term of one year from the day before the date thereof. By indenture dated the 1st August, 1852, certain boxes were demised to Thomas Hughes, to hold from the 1st February now "next ensuing, or from such subsequent day, during the year 1853, upon which the said theatre shall be first opened;" and if not opened during that year, then in the next. On the 26th November, 1852, certain boxes (the same as

those demised on the 3d July as above) were demised to Lord Ward for one year from the 25th November, subject, however, to the indenture of July. There was also an agreement, dated the 20th December, 1851, granting to Messrs. Brandus & Co. certain boxes for one whole year from the 1st March next, 1852. To establish a breach of the covenant "not to encumber," &c., certain warrants of attorney and Judges' orders were relied on. The most material were—One, dated the 25th June, 1852, given by Lumley to William Hughes to confess judgment for 2000*l.* The defeasance showed it was to secure 1140*l.*, the amount of bills becoming due in August, September, and October following. Judgment was signed and registered both in the Common Pleas and in the registry of Middlesex. Another dated the 29th July, 1852, was for 2200*l.*, to secure payment of 1070*l.* on the 30th September. Another, dated the 6th October, 1852, for 12,000*l.*, to secure payment of 6000*l.* in December next. On these also judgment was signed and registered. The defeasances were long and special, and disclosed that they were given for advances; but the terms relied on will be found in the opinions of the Judges. As to the waiver, it appeared that a correspondence, extending over several months, between the defendant Lumley's solicitors and Mr. Martelli, the plaintiff's agent, in which the one party offered rent, and the other declined to receive it, except without prejudice to his right to enforce the forfeiture which he contended had accrued, resulted in an interview between Mr. Barnes for Lumley, and Mr. Martelli. After some conversation, a sum of money, equal to the amount of the Midsummer and Michaelmas rent, was tendered by Mr. Barnes, stating that he tendered the half-year's rent due at Michaelmas, and that he did so without any condition or reservation. Mr. Martelli answered, "that he would not receive the money as rent due under an existing unforfeited lease, but that he was willing to accept it as compensation for the occupation merely, and without prejudice to the lessor's right of re-entry for breach of covenant." Mr. Barnes then said, "that he assented to no such condition, that he tendered the money unconditionally as rent due, and that as rent Mr. Martelli must take it or leave it." After some further conversation, in which each adhered to his intention previously expressed, Mr. Martelli took up the money, saying at the time, "he took it as compensation for the occupation of the premises merely, and not as rent under an existing and unforfeited lease, and that he did not waive the lessor's right of re-entry, but expressly reserved it." No receipt was asked for or given. The Judges who attended were Coleridge, Wightman, Erle, Crompton, Cresswell, (a) and Williams, Js., and Martin, Bramwell, Watson, and Channell, Bs.

The *Attorney-General*, (Sir R. Bethell), *H. Hill*, Q. C., and *Unthank*, for the plaintiff in error.—As to breaches of covenant not to encumber, &c., they cited the 1 & 2 Vict. c. 110; *Ex parte Boyle*, 3 De G., Mac., & G. 515; *Watts v. Porter*, 3 E. & B. 743 (E. C. L. R. vol. 77); *Johnson v. Holdsworth*, 1 Sim. N. S. 106; *Doe d. Mitchinson v. Carter*, 8 T. R. 57, 300; 2 Sugd. Pow. 345, 7th ed.; and *Lady Sussex v. Wroth*, Cro Eliz. 5. The 1 & 2 Vict. c. 110, contemplates every act of charge; *Hill v. Cowdery*, 1 H. & N. 360.† As to waiver, the rule relied on by the Queen's Bench, "*Quicquid solvitur, solvitur in*

(a) Cresswell, J., was, in the interval between the argument and the delivery of the Judges' opinions, appointed Judge Ordinary of the Divorce and Probate Courts.

modum solventis," cannot apply: Clayton's case, 1 Mer. 579, per Sir W. Grant. Here the receiver expressly denies that he so receives. It is impossible to ascribe an intention to a man which he disclaims, unless the law makes it a positive result of his act. The law does not do that. It is not matter of law, but fact: Green's case, Cro. Eliz. 3; compare S. C., 1 Leon. 262; Doe d. Cheny v. Batten, Cowp. 243; Doe d. Morecraft v. Meux, 1 Car. & P. 346 (E. C. L. R. vol. 12), recognised in Jones v. Carter, 15 M. & W. 725;† Doe d. Nash v. Birch, 1 M. & W. 402;† Bailey v. Mason, 1 Ir. Com. Law Rep. 682. Where rent due after a forfeiture was distrained for, with a declaration that it should not operate as a waiver, it was held no waiver; 1 Smith's L. C. 30, 4th ed.; Webb v. Weatherley, 1 Bing. N. C. 502. Hardman v. Bellhouse, 9 M. & W. 596,† shows that the acceptance must be one of the will of the party receiving: Lane v. Horlock, 5 H. L. C. 580.

Sir F. Thesiger, Q. C., Sir Fitzroy Kelly, Q. C., Wells, Serjt., and Maude, for the defendants in error.—First, as to forfeiture, see Doe d. Davis v. Elsam, Moo. & M. 189 (E. C. L. R. vol. 22), Doe d. Palk v. Marchetti, 1 B. & Ad. 715, and Muston v. Gladwin, 6 Q. B. 953 (E. C. L. R. vol. 51), per Patteson, J. The law leans against forfeiture: 2 Bl. Com. 379; Shep. Touch. 88. As to covenant for best endeavours, they cited Simpson v. Sir W. Clayton, 4 Bing. N. C. 758 (E. C. L. R. vol. 33). There is no covenant against assigning the theatre. Lumley might have assigned it to a pauper. The case finds that all the warrants were given bona fide. As to the 1 & 2 Vict. c. 110, s. 13, they cited Lane v. Horlock, 4 Dowl. & L. 408; in notis, p. 494, Withy v. Gilliard; S. C., 1 Drew. 587, 5 H. L. C. 602; and see 13 Eliz. c. 10. As to charges on benefices, see Hawkins v. Gathercole, 1 Sim. 63, and Colebrooke v. Layton, 4 B. & Ad. 578 (E. C. L. R. vol. 24). Secondly, supposing there is a breach in granting encumbrances, the proviso does not apply; "if he shall make default," &c., cannot apply to a positive act: Doe d. Abdy v. Stevens, 3 B. & Ad. 299 (E. C. L. R. vol. 23). There is no covenant against letting in futuro: Fox v. Collier, Anders. 65, pl. 140; Reed v. Ash, 1 Leon. 148. As to waiver, they referred to Doe d. Nash v. Birch, 1 M. & W. 402,† in which Parke, B., explains Green's Case; and Doe v. Pritchard, 5 B. & Ad. 756 (E. C. L. R. vol. 27). The rule "quicquid solvitur," &c., applies, because the party receiving may reject, and need not receive; if he does, it must be according to the will of the payer: Vin. Ab. *Payment* (E), pl. 1; Pennant's Case, 2 Rep. 171; Anon., Cro. Eliz. 68; Bois v. Crampden, Styles 239.

The *Attorney-General*, in reply, cited Doe d. Antrobus v. Jesson, 3 B. & Ad. 402 (E. C. L. R. vol. 23).

The Lord Chancellor put the following questions to the judges:—

1. Whether the special case discloses a breach of the covenant not to grant, let, or otherwise dispose of any of the boxes or stalls of the theatre for any longer period than one year or one season?
2. Whether the special case discloses a breach of the covenant not to charge or encumber the theatre, or any part thereof?
3. Whether, by reason of such breaches (if any), or either of them, the plaintiff in error acquired a right of re-entry on the theatre?
4. Whether such right of re-entry (if any) was waived by the plaintiff in error?

The Judges requested time to consider the questions.

CHANNELL, B.—My Lords, the unanimous judgment of the Court of Queen's Bench in this case is at variance with the unanimous judgment of the Court of Exchequer Chamber. After an able argument at your Lordships' bar, difference of opinion still prevails amongst the Judges who heard that argument. My opinion, in answer to your Lordships' first question, given with great distrust as to its correctness, is, that the special case does not disclose a breach of the covenant not to grant, let, or otherwise dispose of any of the boxes or stalls of the theatre. The covenant is contained in a lease of the 10th July, 1845. That covenant is, that the lessee shall not grant away, assign or let, change or dispose of, any box for any term or number of years whatsoever, or for any longer period than one year or season. The facts applicable to this covenant are, that on the 20th December, 1851, the defendant leased to Brandus certain boxes for one year from the 1st March, 1852; that during that year, 1852, viz., on the 1st August, he leased to Hughes some of the same boxes from the 1st February, 1853, or for one year from the next subsequent day that the theatre should be open during the year 1853. The lease provided, that if the house did not open in 1853, the demise was to be for another year. The usual season for such entertainments is from March to August in each year. The special case finds that in 1852 the season closed on the 13th August. By the conjoint operation of these leases, some boxes were in some sense charged for more than a year or season. I do not feel at all pressed with the argument that the lease to Hughes, considered apart from the lease to Brandus, was a lease to commence in futuro. The term for which the lease was granted, whenever that term was to commence, was one which, in point of its duration, was not prohibited by the covenant. I quite concur in the opinion of the Court of Queen's Bench, that a lease of a box for a term, to commence in futuro, is not of itself a breach of the covenant. Had the lease to Hughes been executed on the 14th August, it would have been, I conceive, free from all objection. Cases with respect to powers do not seem to me very distinctly to apply. As observed in the judgment of the Court of Queen's Bench, this is the case of a covenant in restraint of a power of leasing, which Lumley had by reason of the estate vested in him. But by the conjoint operation of the lease to Brandus and the lease to Hughes, Lumley divested himself, in other words, parted with certain boxes for a period exceeding one year or one season. This view of the case gives rise, in my mind, to some difficulty. It was strongly relied on in the argument at your Lordships' bar, though it was not, so far as I understand, prominently submitted to the Court of Queen's Bench, and is not, therefore, distinctly dealt with in their judgment. With a view to consider whether what at first sight may appear to have been the meaning of the covenant was really and truly the meaning of the parties to it, I may take into consideration the nature of the property—certainly all the terms of the lease in which the covenant is contained. Having done so, and by this help construed the covenant, I think the facts do not disclose a breach. The lease was a lease of a theatre or opera house. It contemplated that the demised premises should be used for theatrical entertainments, and such like entertainments only. It required that the lessee should not only so use the premises, but use his best endeavours to improve the same for

that use and purpose. To this end I think that the lease contemplated that the annual or season income should be applied to the annual or season expenses, and by these means that the opera might be kept open, and the value of the premises (supposed to depend on their use for operatic entertainments) preserved. It was not, I think, intended by the covenant to prevent several separate and distinct lettings, at different times, of one box, each letting being for a term not exceeding one year or season, though the several terms combined might exceed the period of a year, where such lettings might conduce to the improvement and value of the premises to be used as an opera, and where there was nothing to prevent the rent or income under such letting being applied to the current expenses of that year.

I proceed, then, to consider the second question. The mere grant of a warrant of attorney to secure a just debt, or the consent to a Judge's order to sign judgment in a *bonâ fide* action, to which there is no defence, would be no breach of this covenant, though it might lead eventually to the lease being taken in execution. Such is the language of the Court of Queen's Bench. I humbly concur in that portion of its judgment. If the case had found, or there had been facts which in my opinion ought to induce your Lordships to infer, that Lumley (who had power to assign) gave the warrant of attorney with the intent and design to charge the theatre, I should agree in thinking there would have been a breach of the covenant. Apart from the statute, I think that Lumley did not charge the premises. Did his acts, interpreted by the statute, amount to a charge? I think not. If Lumley charged the theatre by warrant of attorney, it was by the warrant of attorney to Mr. Hughes, dated the 6th October, 1852. That is the strongest case for the plaintiff in error. If he did not by that warrant of attorney, he did not by any other. By that warrant of attorney Lumley gave power to Mr. Hughes to charge or encumber the lands, but he himself did not charge or encumber them. If matters had stopped where Lumley's interference ended, there would, I think, have been no actual charge or encumbrance. It is, no doubt, stated in the defeasance that Mr. Hughes was to be at liberty to register the judgment. That power he would have had without any mention of it in the defeasance. The statute was intended to give creditors claiming under acts such as those of Mr. Lumley a better remedy; but it has not, I think, the effect of making that a grant by the defendant of a charge or encumbrance, when, before the act, it could not be said that the defendant had granted the charge or encumbrance. I answer your Lordships' second question by saying that the special case does not disclose a breach of the covenant not to charge or encumber the theatre, or any part thereof.

But as this opinion may not receive your Lordships' sanction, I proceed to consider your Lordships' third question; and for the purpose of answering this, I assume the existence of a breach of both covenants in the first and second questions mentioned. I am of opinion, then, that there was such a right of re-entry. I think that the condition ought to be construed with this amount of strictness, that it ought clearly to appear that the condition was meant to include, and did incorporate, the covenant on the breach whereof the right to re-enter is claimed; but that the question, whether the covenant itself is broken (having once ascertained that the condition for re-entry applies to and includes it), is to

be determined by reference to the rules which prevail in construing ordinary contracts between party and party. I think the condition gave to the lessor a right to re-enter if the lessee did not observe and keep his covenant not to grant or charge in the way, and for a term, prohibited by the lease.

Then, as fourthly inquired by your Lordships, was the right of re-entry, if any, waived by the plaintiff in error? I am of opinion it was not, as regards the breach, if any, of the covenant not to let or otherwise dispose of the boxes or stalls for a longer period than one year or season. I think there is no evidence to show that Martelli knew of the lease to Brandus. It is by the conjoint operation of that lease, and the lease to Hughes, that some boxes were, if at all, disposed of, or parted with, for more than a year, contrary to the covenant. Martelli may be considered as the landlord, Brandus as the tenant; but Martelli could not be held to waive a forfeiture by reason of a breach of covenant of which he had no knowledge. I am of opinion, upon the facts stated, that Martelli had no knowledge of the lease to Brandus. I think he had knowledge of the other acts, and if they are held to be breaches of covenant, he waived them. The party paying the money had, in my judgment, a clear right to appropriate it. He distinctly paid the money as rent; he refused to pay it otherwise than as rent. Mr. Martelli refused in language to receive it as rent, but he did take it. What he did, not what he said, was, in my humble opinion, the all-important matter. He should have declined to take the money at all, if he meant to elect to proceed for a forfeiture. On this point I entirely concur with the judgment of the Court of Queen's Bench.

WATSON, B.—In answer to the first question, I am of opinion that the special case does not disclose any breach of the covenant "not to grant, let, or otherwise dispose of any of the boxes or stalls of the theatre for any longer period than one year or one season." The case states, as regards this alleged breach of covenant, that by a deed dated the 20th December, 1851, Mr. Lumley had granted to Brandus and others certain boxes (amongst others) for one whole year, beginning on the 1st March, 1852; and that by another deed, made on the 1st August, 1852, he had granted to Hughes the same boxes, from the 1st February, 1853, or from such subsequent day as the opera house might be opened, for the whole year. The plaintiff contends, that as this is not a lease in possession, and as it would expire more than a year from its date, it constitutes a breach of that covenant. It is a proper rule of construction that the object and intent of this covenant must be looked at, as well as the words used; and as the object of that covenant was, that these boxes should not be let for more than the season, with a view, no doubt, that the revenues of the theatre should not be anticipated, and as these boxes were really not let for more than one season, I think that the case does not disclose any breach of covenant in this respect.

In answer to the second question, I am of opinion that the special case does not disclose any breach of the covenant not to charge or encumber the theatre, or any part thereof. The covenant in question is, that Lumley "shall not, without the consent of Croft (the lessor) in writing, charge or encumber the said theatre, or the income thereof, or the terms thereby granted, or any part thereof, by mortgaging, or granting any rent-charges, or any other encumbrance or encumbrances what-

soever." In order to support this breach, the case states that Lumley granted several warrants of attorney to several persons for debts due and owing from him, and more especially one to Hughes, in the defeasance to which it was expressed to be a collateral security for a debt, and a provision inserted that the expense of registering the judgment should be borne by Lumley. The nature and effect of a warrant of attorney are well known. Warrants of attorney are generally given where the party, having no defence to an action for debt, authorizes an attorney to confess judgment in order to save expense. The warrant of attorney is no charge on the land. The judgment signed in pursuance of the warrant of attorney may affect a leasehold interest like this in two ways—first, by means of an execution, by which the lease might be taken and sold under a writ of fieri facias; and, secondly, by registering the judgment in the proper office, and, when registered, the judgment would become an equitable charge under stat. 1 & 2 Vict. c. 110, s. 13; and by registering a memorial thereof at the Middlesex registry, the judgment would obtain priority over any charges or judgments subsequently registered at that registry. I think that this covenant applies only to charges and encumbrances directly or immediately made by the lessee, as the covenant is not that the lessee shall not *do any act* whereby the lease may possibly be sold or encumbered. It by no means follows that the person for whose benefit the warrant of attorney is given may ever enter up judgment thereon, or, if judgment be entered up, that he may register the same, so as to charge the lease. It could not be argued that contracting a debt which the defendant was unable to pay, although that might produce a judgment and a charge on the lease, could be a charging or encumbering within the meaning of the covenant. Such a breach would be without the will or consent of the lessee; yet it could hardly be said that the consent to enter up judgment or register is a consent, among more, contemplated by the covenant. I think, therefore, the case as to this breach falls within the principle of *Doe d. Mitchinson v. Carter*, and that no breach of that covenant has been occasioned by the facts stated in the special case.

In answer to the third question, I am of opinion, that if there had been a breach of either of the covenants mentioned and referred to in the first and second questions proposed by your Lordships, the plaintiff in error acquired a right of re-entry on the theatre; for it appears to me that the proviso for re-entry, "if Lumley shall make default of or in performance of all or any of the other covenants, grants, articles, conditions, or agreements which on his part are or ought to be observed, performed, and kept," would apply to and embrace negative as well as positive covenants.

In answer to the fourth question, I am of opinion, that such right of re-entry, if any, was waived by the plaintiff in error. It appears by the special case that the plaintiff, by his agent Martelli, was aware of the lease to Hughes, and of some of the judgments on the warrants of attorney, at the time the money was received by Martelli, although not of all the judgments. This, I think, makes no difference, if he was aware of any one of the registered judgments. It is well established by authorities, ancient and modern, that receipt of rent accrued due after a breach of covenant, known to the lessor at the time of such receipt of rent, is a waiver of such forfeiture, for this reason, that the landlord affirms the

continuance of the lease, and thereby determines the option of taking advantage of the forfeiture for condition broken. The facts on this part of the case are, that Martelli, by his correspondence, asserted that he would not take the money as rent, but would receive it under protest. Mr. Barnes, on the part of the lessee, offered to pay the rent, and tendered it to Mr. Martelli, the plaintiff's agent, as and for the rent, and that it should be received, if at all, as rent. Mr. Martelli took the money up, making the observation that he would take it for the occupation. In my opinion he received it as it was tendered, viz. as rent. It was not offered as for use and occupation, or mesne profits; indeed, it could not be, as the amount or value of the occupation had not been ascertained. The money was tendered as rent, and, being received, it is the receipt of rent; and therefore I am of opinion that there was a waiver of any supposed forfeitures.

BRAMWELL, B.—In answer to your Lordships' first question, I must commence by saying I think it one of considerable difficulty. [His Lordship stated the facts, and read the covenant not to charge, &c.] Now, I quite agree that a lease or disposal of a box for a year or season, to commence in futuro, is not of itself a breach of this covenant; it would not be within the words of the covenant. The box would not be let or charged for a longer period than a year or season. The proof is, that except for that year or season the lessee might deal as he pleased with it. Besides, it is impossible to suppose that the lessee was to wait till the year or season began before he let; for if he was, he could not let for a whole year or whole season. Nor could the difficulty be obviated by his agreeing to let when the season or year commenced, as that would be a charging or disposing of the box. So far, then, I have no difficulty in agreeing with the opinions expressed in the courts below, that a lease for a year or season, to commence in futuro, is not a breach of the covenant. With respect to the authorities cited to show that a power to lease does not authorize leases in reversion, it is enough to say that that was originally determined when the Courts were more prone to make bargains for people than they are at present; that the rule was established, as to an enabling power, on the reason of the thing, which here is in favour of the restraining power not being construed to prohibit leases to commence in futuro. But the difficulty I have felt is, that there is a box charged for a longer period than a year. Whether or no that is a breach of the covenant seems to me to depend on whether or no the covenant means, that no one letting or charging shall be for more than a year, or that no one or more in the aggregate shall be for a longer period than a year. After great doubt, I have come to the conclusion that the former is the construction, and that several lettings, not colourable, but *bonâ fide*, covering a period of more than a year, are no breach of the covenant. The words "shall not grant," &c., "for any term or number of years, or any longer period than one year," are inaccurate; for a grant or demise for the period of a year is a grant of a term. They must, therefore, be read, "for any term or number of years, or any period longer than one year or season." But, according to the literal meaning of the words, the lessee has not granted away, assigned, or let any box for any term, number of years, or period longer than a year or season; for the literal meaning is, that no one act of letting shall be for more than a year; and no one of the periods of

letting is more than a year; and it seems to me that the reason of the thing is in favour of this construction, on the same grounds as those which justify the construction that he may lease in futuro; for it seems unreasonable to say that the lessee could not, just before the conclusion of one season, make a new engagement for the next, or that, having in January let a box for a year from the 1st March, he could not in February let it for the night. So, if a person contemplates absence from London for a year, and then, returning, wished to engage a box for the year of his return, I cannot think that it was either intended that that might not be done, or that, if done, the box must remain empty during the intervening season. This view is confirmed by the clause, that the lessee "shall not *grant* any seat or privilege of admission into the said boxes or stalls, or any other part of the theatre, to any person for any longer period than a year or season;" which, to my mind, means that no one grant shall in itself be for more than a year. This reasoning applies to the words "grant away, let, assign;" but the difficulty, to my mind, arose more on the words "charge or dispose of." I think, however, they must be taken to mean, as the others do, charge or dispose of by one act of charging, or disposing for a period of more than a year. The reasons are the same (I mean those of convenience); so also the literal meaning of the words is as I have suggested. In truth the plaintiff proposes to read this covenant thus—"shall not grant away, assign, let, charge, or dispose of any box for any term or number of years, or for any period longer (or longer period) than one year or season, *or for any terms or number of years, or any periods in the whole longer than a year or season.*" Nor do I see anything in the construction I put on these words opposed to the object of the covenant. That object I imagine to have been, that in the hands of the lessee or his assigns (for he may assign) the theatre should be unencumbered, so that the lessee should be a solvent and responsible person, and that sub-leases of the whole or part were not to be permitted; so that the lessee is the undertaker of the theatre. But why is not that object accomplished by a covenant having the meaning I give to this? It does prevent the lease of any box, or number of boxes, to the same person for more than a year; for it is clear that a lease to A. for one year, and then another to him for the next, and so on, would be found to be colourable, and to be the result of one agreement to let for two years, which would really be a letting and charging for two years. I therefore answer your Lordships' first question in the negative.

As to the second question, these warrants of attorney are not found to be colourable—that is to say, it is not found that there was any bargain between the defendant and Hughes to charge this lease, or the defendant's property generally; and though your Lordships have power to draw inferences of fact, it seems to me clear that there is no ground, and indeed I think there is no evidence, on which it could be found that anything more or other was meant than was said, or that there was any bargain between the defendant and Hughes that Hughes should register the judgments. The stipulation in the warrant of the 6th October, 1852, imposed no obligation on Hughes, as is manifest from its giving him power "when he thinks fit;" and indeed it is one merely introduced *ex majore cautela*, for fear it should be said that not only was there no power till default of payment to issue execution, but that there was also

none to sign the judgment and register it. It is also to be borne in mind, that Hughes did not know, till after his first loan, that the defendant was lessee of the premises in question; that when he first learned it, he was also informed of other alleged property of the defendant; and that if he trusted to the lease, he might calculate on it as a security in a way clearly not a breach of the covenant, viz. as a lease to be seized and sold under a fieri facias. I think, therefore, there is no ground to hold either that there was a bargain that the lease should be charged or made available contrary to the covenant, nor that it was the necessary result of the defendant's acts, even if he made default, and Hughes had recourse to the lease as a means of payment. He has not mortgaged the theatre, its income, or the terms, nor has he granted a rent-charge. Has he then charged or encumbered by *granting any other encumbrance*? I am of opinion that he has not; and that your Lordships' second question must be answered in the negative. I do not dispute that the registered judgments were charges on the theatre, on these leases, and on the defendant's interest in the premises; nor do I doubt the authorities cited on this point; indeed, nothing can be plainer than the stat. 1 & 2 Vict. c. 110, s. 13. My opinion is founded on this—that the defendant has not *granted* the charge or encumbrance. The covenant, to my mind, prohibits an act which is intrinsically an encumbrance, not an act which may or may not lead to encumbrances: *Hill v. Cowdery*, 1 H. & N. 360.† Suppose the lease had been granted before the 1 & 2 Vict. c. 110, and a warrant of attorney given, and judgment signed and registered, would the act have transformed that into the grant of an encumbrance? Suppose the lease granted after the judgment registered, or after the warrant of attorney, and before judgment, would the lessee have granted an encumbrance on it? Or if it were assigned to a person who had such a judgment against him, would he be said to have granted an encumbrance? It is in vain to say the case is within the mischief intended to be guarded against by this covenant. It may be, that had the lessor thought of it, he would have included it in the words used, and that the lessee would have agreed thereto, but he might have dissented; whether or no, your Lordships cannot make an agreement for the parties, however fair or reasonable. If the plaintiff is right, I see not at what his argument is to stop. He reads the covenant thus—“Shall not grant any encumbrance, or do any act which may lead to an encumbrance, or without which there could not be an encumbrance;” so that not only the giving of the warrants of attorney is a breach of the covenant, but so also is the giving of the judges' orders, as indeed the plaintiff contends; so also the incurring of any debt, or the not paying it; so also the negligent driving of a carriage, whereby damage ensues. I think the authorities in favour of the defendant. *Doe d. Mitchinson v. Carter*, 8 T. R. 57, is in point; and the same case (*Id.* 300) was differently decided, not from any change of opinion, but because it was there found (which I say is not and cannot be found here) that the real state of things was an agreement between the lessee and the pretended execution-creditor, that the former should assign the lease to the latter, using the machinery of an action and execution to do it. *Laurence, J.*, says expressly that the parties “*agreed*” to assign. See also *Lane v. Horlock*, 5 H. L. C. 580, and the remarks of the Lord Chancellor (pp. 595, 596), where an opinion is expressed, which, in principle, is in point

for the defendant. The cases also as to charging benefices by warrants of attorney seem to me in point. With great submission, it is wrong to say it was the intention of Lumley there should be a charge—he had no intention on the point. But the capital fallacy is to call the judgment and the registry the *necessary* consequence of his own act, and intended by him. They were not a *necessary* consequence—they were not even a consequence, or no more than they would have been, of his incurring a debt, which not being able to pay, caused him to be sued, and so caused a judgment, and so a registry, and so a charge. The warrant of attorney was not *causa causans*, though it was a *causa sine qua non*. The forfeiture is to be his *act of granting*. When did he forfeit? When he gave the warrant of attorney, without more? Certainly not. When the judgment was signed and registered? That was not *his act*. But, further, the words are not, “if he shall *cause* an encumbrance,” but “if he shall *grant* it.” Assume, then, that a remote causing might be within that word had it been used, surely the word “grant” means such a granting as takes place when a rent-charge is granted. Surely, if the parties meant this case to be included, they would have said so plainly. Why does not the general rule apply, that a grant *ejusdem generis* is meant by the word “other?” A further question has been made, viz. that the stat. 1 & 2 Vict. c. 110, s. 13, cannot apply where its application would work a forfeiture. On the other hand, it is said these words are express, and extend to all interests which the debtor has or could charge, and *Watts v. Porter* is cited. It seems to me that the true construction of the statute is, on this point, against the defendant. There is no exception in the statute; the term was an interest the defendant had, and could charge; and if the words of the lease had been as the plaintiff in fact says they are, viz. “grant any encumbrance, or do anything which may tend to, or without which there could not be an encumbrance,” the case would clearly have been within it. Here the defendant could charge the lease. It is true, his doing so would be contrary to his covenant, and would give his lessor a right of re-entry; but if done openly, would not be dishonest; and, however hard it might be, I think the statute would apply. The suggestion on this point seems to me more valuable in assisting to put a true meaning on the covenant, than as being intrinsically well founded.

In answer to your Lordships’ third question, I am of opinion, that had there been any breach of either of the covenants in question the lessor would have a right of re-entry; clearly he would if the covenant mentioned in the first question was broken; as to the other covenant, the question depends on whether doing a thing prohibited is making default of or in performance, within the meaning of the proviso for re-entry. I think that “default of or in performance of all covenants to be performed, *observed, and kept*,” applies to covenants not to do something, as well as to covenants to do something.

The last question put by your Lordships divides itself into two, viz. whether there was an act in itself an act of waiver; if so, whether it operates in respect of breaches of covenants not known to the plaintiff or his agent at the time of the supposed act of waiver. On both these points I conceive your Lordships desire our opinion. The common expression, “waiving a forfeiture,” though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of

covenant, on which the lessor has a right of re-entry, he may elect to avoid or not to avoid the lease, and he may do so by deed or by word; if with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the statute of Anne), or, demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, or does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases, is, has the lessor, having notice of the breach, elected not to avoid the lease? Or has he elected to avoid it? Or has he made no election? (See the judgment in *Jones v. Carter*, 15 M. & W. 718.†) Now, in this particular case the facts are, that Martelli (who may be considered the lessor) had notice of some of the supposed breaches, and was willing to accept a sum equal to the rent, without signifying his election to avoid the lease or not. Mr. Barnes, who may be considered the lessee, was willing to pay this money, but as rent, and as rent only. After negotiations, they met, each abiding by his own proposition: Barnes placed the money on the table, repeating that he paid it as rent; Martelli took it up, repeating that he took it as compensation for the occupation of the premises merely. Did he thereby elect to treat the lease as existing, or preclude himself from treating it as void? Now, this question supposes there was a breach of covenant, giving a right of re-entry; and it supposes, therefore, that if the lessor elected not to treat the lease as void, rent was due to him; if he did elect to treat it as void, that a compensation was due to him, and not rent. Now, I take it to be clear that the lessor could not do an act affirming the tenancy, and yet say he did not elect not to treat the breach as a forfeiture; for instance, he could not distrain for rent due at Christmas, and at the same time effectually say that he did not elect not to treat an antecedent breach of covenant as a forfeiture; his act would be taken to be right, and bind him, rather than his words should make his act wrong. So, if the lessee had sent the rent in a letter, the lessor could not have kept the money, answering that he had kept it, not as rent, but as compensation, and then afterwards say he had not received it as rent. So here, Martelli had no right to take this money except on the terms on which it was offered to him. It is clear it was never offered to him on the terms on which he said he was willing to take it, nor was any assent given to his taking it on those terms. Did he, then, take it wrongfully? Can he be allowed to set that up? Surely not. The remark in the judgment of the Court of Queen's Bench is well founded, "that if the party to whom money is offered does not agree to apply it according to the express will of the party offering it, he must refuse it, and stand upon the rights which the law gives him." This opinion is not inconsistent with the authorities. *Webb v. Weatherley*, 1 Bing. N. C. 502 (E. C. L. R. vol. 27), shows that a payment must be *taken* as well as made in satisfaction, but it does not show that the mind of the payee must be satisfied, nor that he may not by his conduct preclude himself from denying that he is satisfied. *Hardman v. Bellhouse*, 9 M. & W. 596,† was cited, but that case does not show that the plaintiffs could say they did not take the bill in satisfaction, if the keeping of the bill was wrongful unless it *was* kept in satisfaction. So in *Doe v. Batten*, Cowp. 243, where the *intention* of the parties is spoken of, it is

not meant that the landlord can do an act, lawful only if he has a particular intention, and yet say that he had it not. Further : what is to become of the money ? Can Martelli keep it otherwise than as rent ? Can Barnes get it back ? I am of opinion, therefore, the act was one of waiver. It may seem a refinement ; but had Mr. Barnes given the money to Martelli—that is, put it into his hand after the latter had refused to receive it as rent—I should, on similar principles, have thought it not a receipt of rent, and not a waiver. But I cannot think it was a waiver of unknown breaches. I do not find there was any notice of the lease to Brandus, nor any evidence of any such notice. I think the judgment of the Court of Queen's Bench wrong in speaking of "*this* breach." I think, if any, there were several breaches—that is to say, if the letting of the boxes was a breach, it was a separate breach ; if giving a warrant of attorney was a breach, each giving was a breach. Try it in this way. Suppose the lessor had released the breach of covenant not to encumber so far as relates to the leases of the boxes, would that have released the others ? In the case put in the Court of Queen's Bench, had the lessor released the breach in removing manure, no mention would be made of the quantity, nor would there be any identification of what was released or waived, except the act or breach generally. But suppose there had been two entirely distinct removals, one in one year, and the other in another, and one only specifically released ; or suppose a release given for non-repair of the shed, or a waiver of forfeiture in respect of it, and afterwards a discovery that the house was in danger for want of internal repair, nothing would be waived or released except the breaches specified. I cannot, therefore, assent to this part of the judgment ; and in answer to the last question, I say that such breaches, if any, as were known were waived, and no others.

CROMPTON, J.—As to the first question proposed by your Lordships, I agree with the judgments pronounced in the courts below that there is no breach. It seems to me that the lessee never, at any particular time, did more than let or charge the boxes in question for the next year or season. The lessee had at any time a right to let for a year or season, which I think is fairly construed to mean the ensuing year or season ; and the covenant cannot reasonably be construed to mean that he must wait until such year or season has commenced. His letting or charging for the ensuing year or season, even though the preceding one was not entirely terminated, does not seem to me a breach of the covenant, fairly and reasonably construed. I answer your Lordships' first question, therefore, in the negative.

As to the second question, I think that the special case does disclose a breach of the covenant not to charge or encumber the theatre, or the term granted by the lease. It seems to me that the judgment on the warrant of attorney executed on the 6th October, 1852, amounted to a charge or encumbrance within the meaning of the covenant. The defence shows that the warrant in question was intended to have been executed, together with the indenture of the 1st August, when there was a further advance of 290*l.*, and that the execution of the warrant had been delayed ; and it is expressly given as a concurrent security with the indenture for the better securing the 290*l.*, advanced. It is not the giving judgment earlier than could otherwise be obtained in an adverse action, nor even giving a security for an old debt, if that would have

made any difference; but the judgment, according to the terms of a previous negotiation, is expressly given, and is to be registered as a concurrent security for the advance of money. The lessee gives the warrant with the expressed and avowed object of the judgment being registered against him as a security for the money advanced. It is a security, and the money is secured thereby, and charged upon the subject-matter of the security. The provisions for registration show that it was contemplated that land should be part of the subject-matter of this security; and, at all events, the security, when acted upon according to the expressed intention of the parties, would form a charge or encumbrance on the land. The stat. 1 & 2 Vict. c. 110, expressly makes the judgment, when registered, a charge against the judgment-debtor, whatever may be its effect as against other parties; and it is the interest of the lessee—that is, the term—which it is the object of the covenant to preserve unencumbered. It is said that until the judgment was signed there was no such encumbrance, and that the signing the judgment was the act of the creditor, and not of the lessee; and that it might have happened that the party died, and that no judgment could have been signed. It is quite true that there would have been no encumbrance, and no breach of the covenant, if judgment had not been signed, from death or any other reason; but the question is, whether the signing of the judgment was not really the act of the party giving the warrant, with the intention that it should be used for a security, and should not be enforced by execution immediately. It seems to me that the acting on the warrant and signing the judgment is, for the present purpose, the act of the giver of the security, just as much as the giving a warrant of attorney may be, if such was the intention of the giver, the causing his goods to be taken in execution under the Bankrupt Act. In the case of *Doe d. Mitchinson v. Carter* the covenant was “not to assign,” and certainly the giving the warrant of attorney was not a direct assignment; but even in that case, when it was made to appear that there was an intention to do circuitously what the covenant forbade, it was held that there was a breach of the covenant. The present case appears to me much stronger, as the covenant is against “charging or encumbering the theatre,” &c., or the term, by mortgaging, or granting any rent-charge, or any other encumbrance or encumbrances; and the direct consequence of the judgment is the creation of a charge or encumbrance, and the defeasance shows that the object was that the judgment should be a security. It is not the case of a roundabout way of assigning, but of causing and creating a direct charge upon the land. It seems to me that a judgment binding the land cannot be taken otherwise than as a charge or encumbrance on the land; and I cannot help coming to the conclusion that the lessee in the present case, whether he had or had not the particular property in his contemplation, did, in point of fact, create an encumbrance or charge upon it within the meaning of the covenant in question. The covenant being that he will not charge or encumber, the intention seems to me only material for the purpose of ascertaining whether the charging is *his* act, as, if it be so, *he* has charged the term, and broken his covenant against so doing. Suppose, instead of the covenant against doing an act by way of encumbrance, the covenant in a conveyance of the land had been, that he had done no act to charge or encumber the land, and it had afterwards appeared that the covenantor

had suffered a judgment on purpose to bind the land in question, could it be doubted that the covenantee might maintain an action for damages sustained in consequence of such judgment? But it is said, although the theatre or the term was charged or encumbered, still the wider sense of the earlier words in the covenant is restricted by the later words, "by mortgaging, or *granting* any rent-charges, or other encumbrance or encumbrances." It would, however, be a very narrow construction to hold that the word "*granting*" was used in its technical sense, as referring to something which lies in grant, or that the instrument must be a specialty. If that were necessary, the warrant was under seal, and was given as part of a mortgage security, all the instruments relating to the transaction really being one mortgage security. It is said also that the "other encumbrances" should be of a similar nature with those that precede, as mortgages or rent-charges. The words "any other encumbrance or encumbrances" are, however, very large, and were intended, I think, to be so; and they seem to me quite wide enough to embrace a charge or encumbrance by way of a registered judgment. And I think that construing the words, as we ought to do in an instrument of this description, according to the plain ordinary sense of the words, and with reference to the objects in view, such an encumbrance, so created, as the one before your Lordships, may well be said to have been an encumbrance granted by the lessee. In the present case I would ask, first, was this property, with the other landed property of the lessee, encumbered or charged by this judgment? and, secondly, was it so encumbered or charged by his direct authority, given for the very purpose of creating such a charge or encumbrance on his landed property, as security for the money advanced? I think that the answer must be, that it was so charged or encumbered, and by his authority given for that express purpose; so that the act of encumbering or charging is really his. I concur, therefore, in this respect with the opinion given by those learned Judges of the Court of Queen's Bench who decided the case in that Court, and who held that there was a breach of the covenant not to charge or encumber; and I accordingly answer your Lordships' second question in the affirmative.

I answer your Lordships' third question also in the affirmative, by saying, that in my opinion the plaintiff acquired a right of re-entry by reason of the breach of covenant referred to in the second question.

As to the last question proposed by your Lordships, I am of opinion that, assuming that a right of re-entry had been acquired, it was not waived by the plaintiff in error. The facts of this part of the case are, that the lessee offered to pay a sum of money as rent accruing after the alleged forfeiture, and refused to pay it in any other shape; and the lessor's agent refused to receive it as rent, setting up and insisting on his right to re-enter for a forfeiture, and finally took up the money, saying at the time that he took it as compensation for the occupation of the premises merely, and not as rent due under an existing and unforfeited lease, and that he did not waive the lessor's right of re-entry, but expressly reserved it. In effect, he *received* it only as compensation money, to which he was entitled for the continued occupation and overholding, if the tenancy had been, as he insisted, determined by the forfeiture. Where a lessor has by his acts conclusively, as against himself, admitted the continuance of the relation of landlord and tenant between himself

and his lessee, subsequently to the supposed acts of forfeiture, he is said to have waived the forfeiture. The lessor in such case, as explained in the note to Dumpor's Case, 1 Smith's L. C. 33, 4th ed., has elected, as he is entitled to do, to keep the reversion, instead of insisting on the forfeiture and determination of the lease. But where, as here, he always insists on the forfeiture, he cannot be deemed to have made any such election to keep the reversion. What is called a waiver is not so properly a forgiveness, or a condonation, or a release of a breach of covenant, as an election to take one estate instead of another. Viewing it in this light, the question, whether the lessor knows or not of any of the particular breaches, does not appear to me to be material, as the question really is, does he know or suppose that he has the election in consequence of some breaches, and does he elect still to keep the reversion? Considering it as an election, it certainly appears strange that he should be deemed to elect against his *expressed* determination, communicated to the other party at the time, unless, indeed, his act is inconsistent with any other explanation. A receipt of rent, *eo nomine*, as rent under the lease, at least if unaccompanied by any explanation, is an unequivocal act of electing to keep the reversion; so is a distress, in cases where it can only be justified by the continuance of the tenancy. The authorities appear to me to be in accordance with what seems to me the common sense of the case, where the party refuses to receive the rent as such. Lord Mansfield's observations in *Doe d. Batten* are strong and express, and it is clear that the receipt of rent cannot in every case be treated as *necessarily* waiving the forfeiture, or else it must have had that effect in *Doe v. Meux*, 1 Car. & P. 848, approved of in *Jones v. Carter*. It is true that in all these cases the receipt of rent had been preceded by an ejectment, or some unequivocal act of election, which, according to the doctrine of election, is conclusive when once made; but still the receipt of the rent, though unequivocal, did not necessarily operate as a waiver. In the same way, I think, it may be explained by evidence of conduct at the time, showing that the lessor, whilst he receives the money, is electing to have the land, and not the reversion, as he did in the present case. I think that, in order to operate as an election to keep the reversion, the money should, in the language of Lord Wensleydale (then Mr. Justice Parke) in *Doe v. Pritchard*, 5 B. & Ad. 780 (E. C. L. R. vol. 27), "be received as rent due under a lease." In the present case there was a direct insisting on the forfeiture, and there was a distinct refusal to consider the tenancy as subsisting. The rule of law, that payments are to be taken in *modum solventis*, is a rule of appropriation where there are two debts or demands; and a payment by the debtor expressly in satisfaction of one demand precludes the creditor from maintaining an action for that debt or demand, on the ground that it has not been paid; but that is a very different matter from his being bound to admit that such a demand did exist, when he claims the sum on a different footing. The rule does not appear to me to apply to a case where there is one sum due, or claimed in one of two ways, so as to bind the party receiving the money to an affirmation of the existence of a fact which he is distinctly repudiating. In the present case the plaintiff refused to receive the money as rent, refused to recognise the tenancy as *existing*, and insisted on the forfeiture. I think that he cannot, under such

circumstances, be treated as electing to have the reversion of the tenancy, and as waiving the forfeiture; and in this respect I differ from the conclusion at which the Court of Queen's Bench arrived. I answer your Lordships' last question, therefore, in the negative.

MARTIN, B.—My Lords, in answer to the first question, I say that the special case does not disclose a breach of the covenant not to grant, &c. In order to determine what is its true meaning, it is necessary to ascertain what was the subject-matter of the demise; what circumstances, if any, were peculiar to it; and more especially what is the meaning of the word "season" as mentioned in it; and with this knowledge to read the covenant, and endeavour to determine what its words really mean. [His Lordship stated the facts, and read the demise to Mr. Hughes.] The special case finds that in 1852 the season closed on the 13th August. Now if the lease to Mr. Hughes had been executed on the 14th August, I apprehend it would have been clear that the defendant had not let or charged the boxes for more than one season. The season of 1852 would have been then over, and the letting or charging to Messrs. Brandus would have been substantially at an end; all the beneficial interest under the grant or demise would have terminated, and the demise to Mr. Hughes would be for *one*, viz., the *next*, season. Then does it make any difference that the demise to Mr. Hughes was executed upon the 1st August? And upon the best consideration I have been able to give the question, I think it does not, and that there has been no letting for a longer period than one season, within the true meaning of the covenant. The season of 1852 was substantially over on the 1st August, 1852. This was the usual period for its termination; the thirteen days afterwards, during which the performances took place, was an excrescence upon what was usual. The spirit and intention of the covenant seems to me to have been carried out, and in the result the plaintiff has failed to satisfy me that the lease to Mr. Hughes was a breach of the covenant. He was bound to do so to entitle him to any judgment, and he has not succeeded.

In answer to the second question, I reply that the special case does not disclose a breach of the covenant not to charge or encumber the theatre. The point is, whether the giving certain warrants of attorney was a breach or breaches of the covenant that the defendant should not charge or encumber the theatre, or the term granted by the lease, by mortgaging the same, or granting any rent-charge, &c. The strongest case against the defendant was a warrant of attorney to a Mr. Hughes, and it is, therefore, sufficient to refer to it. [His Lordship referred to the warrant of attorney, judgment, and registry.] The question is, whether there was a charging or encumbering the theatre within the true meaning of the covenant; and I think there was not. A warrant of attorney is a well-known security: it gives the creditor the power of obtaining a judgment in one of the superior courts, and enforcing it precisely in the same way as an adverse judgment. Should the defendant pay the debt, no judgment could be entered up at all; but if he do not, and judgment be entered and registered, the lands of the debtor are charged, and may be taken in execution. When, therefore, a man gives a warrant of attorney, he does an act whereby his lands may be charged; but he does the same thing when he contracts a debt, for he may be immediately sued for the debt, and judgment obtained against

him; and thereby his lands are charged in the same manner, and to the same extent, as by a judgment on a warrant of attorney. It is not correct, therefore, to say that a man charges or encumbers his lands by giving a warrant of attorney. What he really does is, he gives the means whereby his creditor may charge or encumber his lands. Now, in the special case nothing is found beyond that the warrant of attorney was given; it is not found that it was the object and intention of the parties that the theatre should be charged by means of the judgment. Your Lordships have power to draw inferences of fact; but I do not think there is sufficient evidence that the parties had any particular intention to charge or encumber the theatre, or that the warrant of attorney was given otherwise than as an ordinary security. It is stated in the defeasance that Mr. Hughes was to be at liberty to register the judgment; but in reality this is nothing more than he could have done without such words; and they seem to me to have been inserted in the defeasance merely *ex majore cautela*, and if omitted, it would have been of no consequence. The true rule of law upon this subject appears to be laid down in the case of *Doe d. Mitchinson v. Carter*. It was an action of ejectment by a landlord upon an alleged breach of condition not to assign a term. The evidence at the first trial was, that the lessee had given a warrant of attorney for a debt, that judgment had been entered up upon it, and execution issued, and the sheriff had sold the term to the defendant, who had entered, and taken possession of the land. The Court held that *this* was not a breach of the condition. Another ejectment was afterwards brought, and this fact was then added, that the warrant of attorney was executed for the express purpose of enabling the defendant to obtain possession of the lease and the land demised, and in order to evade the condition. The Court then held that *this* was a breach, upon the ground, that what cannot be done *directly*, the law will not permit to be done *indirectly*. I think the principle of that case applies to the present point; and inasmuch as it has not been found in the special case, nor is there sufficient evidence to prove, that the warrant of attorney by the defendant to Mr. Hughes was executed for the purpose of enabling him to get possession of the theatre, in my judgment there has been no breach of the covenant not to charge or encumber.

As to the third question, I say that the plaintiff in error did not acquire any right of re-entry. I collect that your Lordships desire the opinion of the judges upon the point, whether, supposing there had been breaches of the covenants, the plaintiff would have acquired a right of re-entry. The condition upon which the first alleged breach is founded is express, and in the same words as the covenant; and if there had been a breach of this covenant, there would have been a clear right of re-entry. I think it would be impossible to put a different construction upon the same words twice repeated in the same deed. That upon which the second alleged breach is founded is a general condition, that if the defendant should make default in the performance of any of the other covenants, which on his part ought to be performed, observed, and kept (except certain particularly mentioned), it should be lawful for the plaintiff to re-enter, &c. And the point is, whether, assuming the giving the warrants of attorney was a breach of the covenant not to charge or encumber, the condition would reach it. I think it would, and that the

executing a mortgage or granting a charge by the defendant would be a making default in the performance of the covenants to be observed and kept by him. I do not myself consider there is any inaccuracy in language in saying, that a man has performed his covenant when he has not done what he covenanted not to do, or that he made default in performing his covenant when he has done it. The abiding by a covenant is a performance of it—the non-abiding a non-performance. It was clearly the intention of the parties that the condition should extend to every breach of covenant except those specially excepted; and whether it be a condition or a covenant, the intention of the parties, as shown by the words they use, is the true test.

As to the last question, I think the receipt of the rent was a waiver of all breaches of condition which had happened before the rent became due, and which were *known* to the plaintiff, but was not in respect of any breach of condition not known to him. It was argued that the real question was, whether or not the plaintiff, or the person who represented him, intended to waive the forfeiture; but in my opinion this is not so. The rule laid down in *Co. Litt. 211 b*, is, "If he accept a rent due at a day after, he shall not enter for the condition broken, because he thereby affirmeth the lease to have a continuance." In *Green's Case* (*Cro. Eliz. 3*), the rent had been duly demanded on the day, and not paid, but two days afterwards it was paid and accepted, and an acquittance given by the name of "the landlord's fermor;" it was clearly resolved (the report states) "that the bare receipt of that particular rent after the day was no bar, for it was a duty due to the landlord; but a distress for the rent, or a receipt of rent due subsequent day, was a bar, for these acts do affirm the lessee to have lawful possession." So making an acquittance, reciting that he *is* his tenant, and in the case cited calling him "*his* fermor," was such a declaration of the landlord's meaning to continue him his tenant as barred or waived the right of re-entry. So also *Serjeant Williams*, in his note to *Duppa v. Mayo*, 1 *Wms. Saund.* 287 d, says, "The acceptance of rent accrued after, if the lessor had notice of the breach of the condition," bars the right of entry. In my opinion this is the true principle, and if a landlord receive rent which falls due *after* a condition broken, of which he had notice, the right of entry is waived or barred, and his intention and desire not to waive it is immaterial. In the words of Lord Coke, "by his act of accepting the rent, he hath affirmed the lease to have a continuance." The question then arises, was the money paid to and accepted by Mr. Martelli (who has been assumed throughout all the arguments on this case to entirely represent the plaintiff) as rent? I think it was. Mr. Martelli appears to me to have laboured under a misapprehension, both of fact and of law; he seems to have thought, that upon a condition being broken, and the tenant continuing in possession, this state of things arose—that the landlord had a right of re-entry from the time of the condition being broken, and that the tenant, continuing in possession, was liable to pay a compensation as for use and occupation, the measure of the amount being the rate of rent reserved by the lease. But I apprehend this is not so. Upon the breach of condition, the landlord would acquire a right of entry. If he brought an ejection, his title would accrue at and from the time of the breach, and he would be entitled to maintain, not an action for use

and occupation, but one for mesne profits for the time intervening between the accruing of his title and his obtaining possession. So also, if he entered without an ejectment, I apprehend his claim for compensation, in respect of the wrongful occupation of his land from the time of the breach until the actual entry, would be in the nature of a demand for mesne profits, and not for use or occupation, which, generally speaking, is founded on a contract, express or implied. But, however this may be, I think it is clear that the reserved rent is not the measure of compensation. In this particular case, if the period to be compensated for was the "season" between March and August, a jury would have been well warranted in giving an amount equal to the whole rent, or indeed it might be more, and not merely an aliquot part of it, commensurate with the period of occupation. On the other hand, if the period to be compensated for was at another time of the year, they would have been equally well warranted in giving an amount merely nominal. There was, therefore, no such demand existing as Mr. Martelli seems to have thought. But whether or not Mr. Barnes, the agent of the defendant, was in possession of the money, it was his right to appropriate it, and pay it in what manner, and for what demand, he thought fit. Mr. Martelli was at liberty to take it or reject it, at his pleasure; but if he took it, he, in my judgment, took it according to the will of the defendant, as expressed by his agent at the time of payment, and what he said to the contrary is immaterial. The maxim of law, as well as of reason and good sense, is, "*non quod dictum est, sed quod factum est, inspicitur.*" Assuming Mr. Martelli to be the landlord, in my opinion the acceptance of the money paid by Mr. Barnes on the 27th October, 1854, waived all breaches of condition then known to him. As to the breach or breaches of condition not known, it had no effect or operation: *Penant's Case*, 3 Rep. 64 b; note to *Duppa v. Mayo*, 1 Wms. Saund. 287 d. In the language of Serjeant Williams, "the notice of the forfeiture is a material and issuable fact." According to the statement in the special case, I think Mr. Martelli must be considered to have had notice of the warrants of attorney, but not of the forfeiture (if any) created by the lease to Mr. Hughes; for although the case finds that he had notice of this lease, it does not find that he had notice of the previous letting to Messrs. Brandus. I therefore answer the first three questions in the negative, and the last in the affirmative, as to the supposed right of re-entry created by the warrants of attorney, but in the negative as to that created by the lease to Mr. Hughes.

WILLIAMS, J.—In answer to the first question, I have to state my opinion, that the special case does not disclose a breach of the covenant "not to grant," &c. I think the meaning of the covenant is, that no one single letting or charging shall be for a longer time than one year or one season. With respect to this question, I believe the Judges are unanimous, and I will, therefore, but take leave to say, that I concur with the view of it which has been already expressed to you at large by Bramwell, B.

As to the second question, I am of opinion that the special case does not disclose a breach of the covenant not to "charge or encumber the theatre, or any part thereof." [His Lordship read the words.] It appears on the special case that judgments were signed and registered on warrants of attorney given by the lessee to secure money advanced

to him, and the defeasances of some of those warrants expressly authorized judgments to be immediately entered up and registered. On the part of the appellant it is contended, not only that the judgments, when so signed and registered, constituted an encumbrance (of which, I think, no doubt can be entertained), but also that the lessee, by putting it into the power of his creditor so to sign and register the judgments, had broken the covenant by "granting an encumbrance." But I am of opinion that this is not so; for that, when the covenant speaks of "granting any rent-charge or other encumbrance," it means to prohibit encumbrances which will be immediately fastened on the estate by force of some grant or other act of the lessee, and not the doing of acts like these warrants of attorney, which may or may not end in becoming encumbrances at some future time, according to the course which the creditor chooses to take. It is plain that the mere giving of the warrants of attorney cannot constitute the grant of an encumbrance. They might have proved wholly inoperative, by reason of being countermanded by death before any judgment was entered, or the creditor might have chosen to neglect altogether to act upon them. And if the giving of the warrants of attorney be not the grant of the encumbrance, how can it be said that the lessee granted it at all? It is plain that *he* did nothing else than give the warrants. The encumbrance was effected, not by *his* act, but by the act of the creditor in signing and registering the judgment. With respect to the authorities, the case most relied on by the appellant was *Doe d. Mitchinson v. Carter*. But as to the application of that decision to the present question, I beg to refer your Lordships to the judgment of the Court of Exchequer Chamber (reported 5 E. & B. 689 (E. C. L. R. vol. 85), in which I concurred, and to which, I take leave to say, I continue to adhere.

As to your Lordships' third question, I am of opinion that, if any breaches of the covenants occurred, the plaintiff in error acquired a right of re-entry, for I think the proviso in the lease is applicable to a breach of a negative as well as a breach of a positive covenant.

As to your Lordships' last question, I am of opinion that the right of re-entry, if any, was waived by the plaintiff in error as to all the breaches of which he had notice. It was established as early as *Pennant's Case*, that if a lessor, after notice of a forfeiture of the lease, accepts rent which accrued after, this is an act which amounts to an affirmance of the lease and a dispensation of the forfeiture. In the present case the facts, I think, amount to this—that the lessor accepted the rent, but accompanied the acceptance with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion that this protest was altogether inoperative, as he had no right at all to take the money unless he took it as rent. He cannot, I think, be allowed to say that he wrongfully took it on some other account; and if he took it as rent, the legal consequences of such an act must follow, however much he might desire to repudiate them. But those legal consequences are only, I apprehend, that the lessor thereby affirms the lease, and dispenses with the forfeiture of which he then had notice. The distinction has been long established between conditions which are collateral and those which are annexed to the rent—that, as to the former, notice of a breach is material and issuable. The reason is mentioned in the first resolution in *Pennant's Case*, viz., that if it

were otherwise the lessee might take advantage of his own fraud, for he might purposely commit an act of forfeiture so secretly, and so near the day on which the rent is to be paid, as that it should be impossible for the lessor to come to the knowledge of it.

ERLE, J.—I answer your Lordships' first question in the negative. The covenantor did not charge or dispose of any boxes for any longer period than one year or season. The facts are, that the covenantor, in December, 1851, charged and disposed of certain boxes to Brandus for one year from the 1st March, 1852; and on the 1st August, 1852, he charged and disposed of the same boxes to Hughes for one year from the 1st February, 1853. Neither of these instruments of charge, taken by itself, created a forfeiture, as there is no covenant against granting leases commencing in futuro, nor against granting leases in reversion, nor against granting leases that would not expire within a year from the making thereof, provided the term granted did not exceed a year or season. The plaintiff contends that the covenant was intended to prevent an anticipation of the profits, and to make the receipts of each year applicable to the expenses thereof. Probably it may be so, but no such intention is expressed. The prohibition, in literal terms, is against a longer term than a year or season, and neither of the grants in question violates that prohibition. There is no pretence for saying that the two grants were intended to be a colourable compliance with, though a substantial breach of, the covenant. If the substance of the covenant is regarded, the lessee has substantially complied with it. All grants are operative only for the opera season—the time during which the theatre remains closed is of no importance. The grant to Brandus is, in effect, for the opera season of 1852; and almost at the close of that season the grant to Hughes for the season of 1853 is made. If the season for 1852 had been over when the grant to Hughes was made, the plaintiff could not, in reason, contend that there was a breach, as there would be no charge or disposition for a longer period than a season, although for longer than a year. The covenant has thus been substantially complied with, and I cannot find a clear violation of the literal meaning of the words. I therefore answer this question in the negative.

I answer the second question in the negative. No direct charge or encumbrance was created, nor was any indirect power given of charging by a judgment, coupled with an intention on the part of the covenantor that it should be used for the purpose of charging, so that the covenant might be apparently complied with, and really broken, as was the case in *Doe d. Mitchinson v. Carter*.

As my answer to the first two questions is in the negative, the third question does not arise. If either had been answered in the affirmative, the answer to the third question would be affirmative also.

The fourth question does not arise, for the same reason. If it had arisen, the lessor waived all the breaches that he had notice of when he accepted a payment of rent accruing after notice; and if he had notice of several breaches of one covenant, and waived them all, and afterwards discovered another breach of the same covenant, not differing in circumstances from the breaches which he had waived, I think the waiver would extend to such a breach, though unknown at the time of the waiver.

WIGHTMAN, J.—With respect to the first question proposed by your Lordships, I am of opinion that the special case does not disclose a breach of the covenant “not to grant, let, or otherwise dispose of any of the boxes or stalls of the theatre for any longer period than one year or one season.” My reasons for this opinion are the same as those given by both the Courts below upon this point, and I therefore will not take up time unnecessarily by repeating them.

The second question is one of considerable difficulty; but, after much consideration, I have come to the conclusion that the special case does disclose a breach of the covenant not to charge or encumber the theatre, or any part thereof; and I therefore answer that question in the affirmative. The judgments upon the several warrants of attorney mentioned in the case, when entered up and registered, have, by the 1 & 2 Vict. c. 110, s. 13, the same effect as a charge upon the theatre, as if the person against whom the judgment is entered up had had power to charge it, and had by writing under his hand agreed to charge it, with the amount of the judgment-debt and interest. But though the judgment is a charge upon the theatre, it is not a breach of the covenant, unless it be a charge by the lessee granting a rent-charge or other encumbrance. The only act done by the lessee is the giving warrants of attorney to confess judgments, which warrants are in themselves neither charges nor encumbrances; but the judgments which the creditors are enabled to sign by means of them are. If the lessee had given to a *bonâ fide* creditor a promissory note payable on demand, upon which an action had been brought, and the lessee, having no defence, had given a *cognovit*, upon which judgment had been signed, or had suffered a judgment by default, could he be said to have granted an encumbrance upon his leasehold property within the meaning of such a covenant as that in question? I think not; and the case would fall within the principle of the first decision in the case of *Doe d. Mitchinson v. Carter*. But it is urged that the defeasances to the warrants of attorney, and in particular to that of the 2d November, 1852, show that the object of the lessee was to create a charge upon the theatre by giving those warrants of attorney. The defeasance to the warrant of attorney of the 2d November recites the debt, &c. By this warrant of attorney and defeasance, Lumley authorized the creditor to enter up judgment forthwith, and issue execution immediately; and as the judgment, when signed, was by his authority, and without any action brought, the effect was the same in charging the theatre as if the lessee had directly, and in terms, granted an encumbrance upon it; and I am, upon the whole, of opinion that, giving a reasonable construction to the term “grant,” as used by the parties to the lease, Lumley did voluntarily create a charge upon the theatre, which operated as a grant of an encumbrance within the meaning of the covenant.

As I am of opinion that there has been a breach of the covenant not to charge or encumber the theatre, I am also of opinion that the plaintiff acquired a right of re-entry under the proviso for re-entry in case of breach of covenant; and I therefore answer your Lordships’ third question in the affirmative.

In answer to the fourth question proposed, I am of opinion that the right of re-entry was waived by the plaintiff in error. Acceptance by a landlord of rent accruing due from a tenant after knowledge by the

landlord of a breach of covenant by the tenant, which gives the landlord a right of re-entry on the ground of a condition broken, amounts to a waiver of the right to re-enter, as it is, in effect, an admission that the tenant held rightfully as such at the time the rent accrued. If it be necessary to cite any authority for this position, I may refer to *Green's Case*. In the present case, Mr. Martelli (who represented the plaintiff) was aware, at the time he received the rent due at Michaelmas, 1854, that the plaintiff claimed a right to re-enter by reason of the warrants of attorney and judgments being, as alleged, grants of encumbrances, within the meaning of the condition in the lease. He knew that this condition had been broken, and accepted rent accruing due after. It is true that he insisted upon receiving it, not as rent, but as compensation for occupation; but he was told by Mr. Barnes, who paid it, that he must either take it as rent, or leave it. He chose to take it; but, in that case, he is bound to take it as paid; or, if he objected to the terms on which it was offered as payment, he should have refused it. I therefore answer your Lordships' fourth question in the affirmative.

COLERIDGE, J.—In answer to your Lordships' first question, I think that the special case discloses no breach of the covenant therein referred to. It appears to me that that covenant contemplates the period *for* which, by the operation of any grant, sub-lease, or other instrument, the box or stall should be bound, not the time *at* which such grant, sub-lease, or other instrument should be made; and I think, further, that apart from fraud or colour, the granting of successive leases of the same box to the same tenant would not occasion a breach, although these leases, or some of them, might be in existence, the terms, however, under them not running at the same time. This last is, indeed, but a corollary from the former proposition. As I have been allowed to read my brother Bramwell's answer to this question, and agree to his reasons as well as his conclusions, I think it better to refer to them, and adopt them as my own.

I have had more difficulty in settling my mind as to your Lordships' second question, and it is only with some remaining doubts that I answer, that the special case does not now seem to me to disclose a breach of the covenant not to charge or encumber the theatre, or any part thereof. The covenant in question is—[His Lordship read it.] This follows on the covenant not to underlet or assign without the license and consent in writing of the lessor. The two may be considered as branches of one entire covenant, and perhaps the condition of a license from the lessor may attach to both, which would help to the construction I give to the part now under consideration. But, whether this be so or not, I think that this branch, as well as the other, contemplates only acts done by the lessee, and their direct consequences. As the lessee must grant the mortgage and the rent-charge in order to break the covenant, so he must *grant* the encumbrance. It must be the direct consequence of some act of his that the term is to be encumbered. To adopt my brother Bramwell's language, his act must be the *causa causans* of the encumbrance, not merely the *causa sine qua non*. If his act may be complete, and yet no encumbrance be created, then he cannot be said by his act to have granted the encumbrance. Thus far I proceed with considerable confidence. My doubts arise upon the application of this principle of construction to the warrant of attorney granted by Lumley

to Hughes, and its defeasance. By the defeasance it appears that the warrant was given, and the judgment to be entered up thereon was intended, as a concurrent security with others, which were by way of mortgage for the payment of a sum of 290*l.*, then advanced, on a future day named, and interest in the mean time. [His Lordship stated the facts.] The judgment so entered up and registered clearly operated as a charge on the theatre, and on the terms, under the 1 & 2 Vict. c. 110, ss. 13, 19. But are the signing the judgment, and the registering it, the acts of Lumley or of Hughes? Simply to allow judgment to be signed for an admitted debt is no more to grant an encumbrance on the debtor's property, in the sense of a covenant against such granting, than to contract the debt, and, after a hopeless and unconscientious litigation, to have the judgment pronounced. In both cases the same result must equally have been within the contemplation of the borrower. So, again, to consent that the judgment, when entered up, shall be registered, is, in truth, to do nothing. Without the consent of the borrower, the lender would have the same power to do the act as with it. Whether he will sign the judgment or not, and, when signed, whether he will register it or not, depends on the election of the lender; and the only really effective part of this clause of the defeasance is, the restraint upon the lender as to issuing execution on the judgment. In the judgment of the Queen's Bench, in which I certainly concurred, it is said that "the defeasance shows the purpose, that it should be done by Lumley's authority, which amounts to a charge or encumbrance within the meaning of the covenant." The *thing to be done*, here referred to, is the appearing and confessing an action; but it is admitted just before, that a mere warrant to secure a just debt would be no breach of the covenant, "though it would lead eventually to the lease being taken in execution." Upon reconsideration, I think that the difference between an ordinary warrant and the one now in question is nominal and apparent only. A purpose is expressed which else would be implied, and a permission given which could not be withheld, and which operates nothing, because the law would have conferred the same right without the concession of the party.

In answer to the third question, I should be of opinion that a right of re-entry would have been acquired by reason of each of the above-considered breaches, if I were wrong in the answers I have given to your Lordships' former questions, or either of them.

In answer to the last question, I am of opinion that the right of re-entry, if any, was entirely waived by the plaintiff; or perhaps, speaking more accurately, that the plaintiff estopped himself from insisting on it; and I found this entirely on the special circumstances disclosed in the special case, not contravening any of the principles of law relied on by those who maintain a contrary opinion. On this ground I think no distinction is to be made between breaches which Martelli, whom I take to represent the plaintiff, actually knew of, and those which he did not, because the substantial question between him, on the one hand, and Barnes, representing the defendant, on the other, was this—"Will you accept this payment as rent, and thereby acknowledge an existing lease or not?" Now, this question being raised, where it is clear that Martelli considered that there were one or more grounds on which a right of re-entry might be insisted on, and knew that Barnes meant to pay

nothing unless it were accepted so as to set up that lease as good against all such rights, I think, if he did accept the payment in such a way as to waive *any* rights, it must be taken that the acceptance would waive *all*. In effect, Barnes says, "I will only pay on the footing of this being a *good* lease against all rights of re-entry, how many soever they may be;" and if he had said this in terms, and Martelli, without more, had accepted the payment, he certainly could not have said afterwards, "I may still re-enter, because, though I know of some breaches, there was one, or it may be more, which I was ignorant of." The question then is, in my opinion, did he accept the money so as to waive *any* single breach? Now, it is true that he protested against doing so when he took up the money. But what were the previous facts and the rights of the parties, and what did Martelli do? Barnes produces the money; there is a discussion; Martelli seeks to impose a condition; Barnes will not assent to it, and says, "As rent you must take the money, or leave it." Martelli says, "I understand your meaning," and takes it, protesting at the same time that he expressly reserves the right of re-entry. These are the facts; and what were the rights of the parties? The money was the property of Barnes; with him lay the right to impose the terms on which alone Martelli could lawfully take it; while Martelli might insist on his alleged right of re-entry, or he might take the money and waive it; but I think he could not do both—take the money, on the taking of which the owner had imposed a lawful precondition, and yet insist on the right of re-entry, which was inconsistent with that condition. Considering the term imposed, Martelli's act and declaration were inconsistent with each other; and when that is the case, the former is to be regarded as binding, and not the latter. On this ground, shortly stated, I answer your Lordships' fourth question in the affirmative.

The House adjourned for further consideration.

Lord CRANWORTH.(a)—My Lords, this was an action of ejectment, which was brought by the plaintiff in error, Croft, against the defendant below, and also the defendant here, Lumley, and a great number of other persons, to recover possession of the Opera House. The defendant Lumley is the lessee of the Opera House under the plaintiff. The other defendants need only be described as persons who have an interest under Lumley. The ejectment was brought upon a right of entry which was reserved in the lease from Croft to Lumley for breach of several covenants. At the trial, which took place in Hilary Term, 1855, a verdict by consent was taken for the plaintiff, subject to a special case. The case states three covenants. [His Lordship stated them fully.] Lumley, after the execution of the lease, entered, and used the demised property as an opera house for the term of the demise, which took place in 1845, up to August, 1852. But after that time the theatre never was open, up to the time of bringing the action, which was commenced in December, 1854. In the first place, it was contended that this closing of the theatre from the end of August, 1852—that is, from the end of the season of 1852—up to the time of bringing the action, was a breach of the covenant which Lumley had entered into, to use his best endeavours to improve the theatre. Secondly, the special case, subject

(a) Lord Cranworth had in the mean time resigned, and Lord Chelmsford had been appointed Lord Chancellor.

to which the verdict (as I have already stated) was taken, finds that several leases or agreements for leases of several boxes and stalls had been made by the defendant, which were alleged to be breaches of the covenant not to lease for more than a year or a season. [His Lordship described the leases to Brandus and Hughes.] There were several other leases of the same nature, the particulars of which I do not think it is necessary to mention. It is alleged that these leases, or agreements for leases, were a breach of that covenant not to let any of the boxes for more than a year or a season—the leases, it will be observed, having been made in the month of August, 1852, for a year, to commence in the following February, or for the season, which ordinarily began in the February of the following year. Thirdly, it is alleged that the defendant had been guilty of a breach of the covenant not to charge or encumber the property. The Court of Queen's Bench, in which the action was brought, was of opinion, upon this case, that there was no breach of any covenant, except the covenant not to charge. But Lumley having given warrants of attorney (under which, it is hardly necessary to say, the persons to whom the warrants were given, by entering up judgment, might eventually take in execution, and so obtain possession of the property), that Court held that the giving of those warrants of attorney was a breach of the covenant not to charge. But that Court also held that that was immaterial, because, upon the facts stated, the right of re-entry was gone by reason of the plaintiff having accepted rent after he had notice of the breach in question; and therefore gave judgment for the defendants, the Court holding, that though there was a breach of one covenant, and one only—namely, the covenant not to encumber—and though that breach gave a right of re-entry to the lessor, yet that the right of re-entry had been waived or abandoned by the landlord having accepted rent after notice of the breach. The plaintiff below, who is the plaintiff here, was dissatisfied with that decision, and took the case to the Court of Exchequer Chamber, and that Court came to a conclusion having a like result, though not exactly upon the same grounds; for whereas the Court of Queen's Bench had held that there was no breach of any covenant but one, and that of that one there was a breach, but that no advantage could be taken of that breach, because there had been a waiver, the Court of Exchequer Chamber held that there had been no breach of any of the covenants, and consequently that the judgment for the defendants was right, though upon a different ground—they not meaning to say that they did not concur with the Court of Queen's Bench as to there having been a waiver, if there had been a breach of the covenant, but being of opinion that there had been no breach of any of the covenants contained in the lease. From that judgment the plaintiff in error, by a writ of error, brought the matter under the consideration of your Lordships' House, and your Lordships heard the case last year, with the assistance of nine of the learned Judges; and the Judges, not agreeing in the views that they took upon the subject, desired time to consider and deliver their opinions to this House. Your Lordships agreed to that, and the Judges gave their opinions immediately before the last spring circuit. Though they were then given, your Lordships had not the advantage of seeing them in print till within the last two or three weeks; but having now had that advantage, your Lordships have given great attention to the reasoning

of the learned judges. With regard to the first alleged breach of the covenant, that Lumley would use his best endeavours to improve the Opera House for the purpose for which it was demised to him, of which it was alleged there was a breach, by his not having kept it open in the seasons of 1853 and 1854, your Lordships, at the time of the argument, intimated a very strong and decided opinion that the facts warranted no such conclusion; that there was no pretence for saying that there had been any breach of the covenant upon that ground. That the meaning of the covenant was, that he should, by having proper scenes, and by having the house properly painted and kept in order, improve the house; but not if he found that there would be no benefit in opening the house at all—if it would not pay the expenses of having theatrical representations at all—that he should, at his loss, with no benefit to the landlord, keep it open, without any corresponding advantage. Your Lordships expressed so clear an opinion upon that point at the time of the argument, that your Lordships did not desire the opinion of the learned Judges upon it. I happened to know, by communicating with them at the time, that they never had the slightest doubt upon the subject. Your Lordships put four questions to the learned Judges, which raised the whole matter in dispute. [His Lordship read the questions.] The learned Judges have given very elaborate opinions in answer to all the said questions. They all say, that in their opinion there was no breach of the first covenant; that is, the covenant not to let for more than one year or one season. Seven out of the nine Judges say that there was no breach of the second covenant, “not to encumber,” &c. Of the two learned Judges who considered that there was a breach of that covenant, one thinks that the right of re-entry, which accrued in consequence of that breach, was waived by the subsequent acceptance of rent; the other thinks, not only that there was a breach, but that there was no waiver. The result therefore is, that all the Judges but one are of opinion that the judgment was rightly given for the defendants below, who are the defendants here. Upon the first point, upon which all the learned Judges concur, I think there can be no possible doubt that your Lordships will at once accede to the view which they took on that subject. The question substantially is, whether a lease executed in August, 1852, to take effect for the year which was to commence from the following February, is a breach of the covenant not to lease for more than one year; but the learned Judges all hold that that is not so. How is it a breach of the covenant? It is a lease for only one year. It is said that it is a breach because it is a reversionary lease; that where there is a power to lease, although nothing is said of its being a lease in possession by implication of law, it is understood that it must be a lease in possession. But this is not a lease under a power which the party could not execute but for the power. This is a lease by a party having an absolute interest—I might say, for this purpose, a fee-simple, though it is only a long term of years. He has an interest which enables him to grant a lease, and it is a covenant in restraint of his ordinary common right and power arising by virtue of his interest in the property, restricting him from doing that which but for that covenant he would be entitled to do. The covenant is, that he would not lease for more than a year. He has not leased for more than a year; therefore he has not in terms broken the covenant. I doubt whether we ought to go beyond

that. But it was said that that construction might enable the party entirely to defeat the primary object of the parties to this covenant. I do not think it is so at all. We need not decide what would be the case if a lease had been made to a party for one year, and then again, at the same time, concurrently with that, a lease for another year, to commence at the end of the first year, and so on. Possibly that might be held to be a lease for more than a year, although in point of fact it may appear to be otherwise; that is not the question which we have to decide. This is simply a question whether, either in form or in substance, it is any violation of the covenant to have made a lease which was to endure for one year, and one year only, commencing at the beginning of the ensuing season. I am of opinion that it was not, and that therefore the learned Judges are quite right. Indeed, upon this part of the case no possible doubt can be raised. The second alleged breach is certainly one which gives rise to somewhat more difficulty—namely, whether the warrants of attorney which have been given were or were not a breach of the covenant not to encumber. [His Lordship described the warrants of attorney.] The question here arises, upon the Act of the 1 & 2 Vict. c. 110, whether these instruments do or do not amount to such an assignment or charge of the property as to constitute a breach of the covenant not to encumber. The 13th section of that act enacts, that any judgment “shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands; and that every judgment-creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment-debt, and interest thereon.” Now, the question is, whether a warrant of attorney given under the circumstances in this case—namely, *bonâ fide* given to secure debts, and nothing more being stated—then does that or not amount to giving an encumbrance within the meaning of this clause? This is a point which has been several times of late under discussion. I have more than once, in the discharge of my official duties, had occasion to consider it, and I confess it is a point upon which I have very often had great difficulty in making up my mind; but in the result I still adhere to the opinion which I expressed in this House in the course of the argument of the case of *Lane v. Horlock*, that this is a

point upon which it is impossible to state any abstract opinion which shall govern every case. I am of opinion, as I there stated, that simply giving a warrant of attorney, if it is *bonâ fide* given to secure a debt which the party might recover by process of law, and in respect of which, if the debtor does not give a warrant of attorney, the creditor will recover judgment adversely, in such a case to give a warrant of attorney, in order to avoid the expense of law proceedings, is not a charge within the meaning of that statute. But if a person, not having a power of assigning or charging the property, gives a warrant of attorney with a view to evade that restriction which is imposed upon him, then the circumstances may be such as to make it amount to a charge or encumbrance, or at least to estop him from saying that it is not a charge or encumbrance to all intents and purposes. The distinction is admirably illustrated by the case of *Doe d. Mitchinson v. Carter*, in which the principle was elucidated in both its aspects, for, in the first instance, there had been an ejectment brought, and there it was found that a party who was restrained from assigning had given a warrant of attorney. The Court of Queen's Bench, after a long argument, held that that did not amount to a breach of his covenant not to let, set, assign, transfer, make over, barter, or otherwise part with the indenture. He could not help his creditors bringing an action and recovering judgment; and if he, to save the expense, vexation, and delay of an action, gave a warrant of attorney in order to close the proceedings at once, the Court held that he might lawfully do so, and that therefore that was no breach. But a second ejectment was afterwards brought, in which, upon a special verdict, it was found that the lessee, wishing to assign the property, entered into a compact with a person to whom it was to be assigned, and because he could not do that *per directum*, he gave him a warrant of attorney, which would enable him to take it in execution. When that second verdict came to be considered the Court of Queen's Bench held that that entirely varied the case; and under these circumstances the warrant of attorney was held to be a breach of the covenant or restriction not to assign, and judgment was given accordingly. Now, applying the principle of that to the present case, in advising your Lordships, I am to say whether there is, upon the face of this special case, anything that ought to satisfy us that the giving this warrant of attorney was a contrivance by Mr. Lumley indirectly to effect an assignment which he could not effect directly. I think there is nothing to warrant any such conclusion. In the first place, although it is stated that it was known to the creditor, Mr. Hughes, that Mr. Lumley was the lessee of the opera house, I do not find it anywhere distinctly stated that that was the moving cause on his part; but it would be necessary to show, not merely that it *was* the moving cause on his part, but that it was known to Lumley that he had not the power to assign, and that he gave this warrant of attorney for the purpose of enabling him to do that which he could not do according to the terms of his lease. I think, when we look at what occurred afterwards, it is perfectly clear that that was not the meaning of the parties, and that, in point of fact, no proceedings have been adopted in order to get possession of the opera house. The warrants of attorney remain just as they were, the property of Mr. Hughes; whether they have been paid or not is not stated. It does not appear that the opera house was at all transferred from the

one party to the other—it remains just as it was; and therefore, upon this point, I advise your Lordships strongly to concur in the opinion, not unanimous, but yet the opinion of seven out of the nine of the learned Judges who heard the case. I move accordingly that your Lordships should give judgment for the defendants in error.

LORD WENSLEYDALE.—My Lords, I have no difficulty in concurring in the advice which has just been given, and I have very little to add to the reasons for that advice. This was an ejectment, which was brought by the lessor of the opera house upon the covenants contained in the lease granted of that house on the 10th July, 1845, as to part for a term of sixty-six years, and as to the other part for a term of fifty-one years. The first question is, whether there has been any breach of the covenants contained in this lease. The Court of Queen's Bench gave their judgment upon a case which was stated for that purpose under the Common Law Procedure Acts, 1852, (sect. 46), and 1854, (sect. 32), as a substitute for a special verdict, stating the terms of the lease, and all the facts necessary for their decision, there being a power of bringing a writ of error upon such judgment, involving both fact and law. There is no necessity for me, in the view that I take of this case, to offer any opinion upon any question of fact. The points for your Lordships' decision are purely questions of law. There are three covenants contained in the lease which are alleged to have been broken. The first is as to improving the property. The breach alleged is, that he did not do that in fact. The evidence is, that there was a part of the term during which the Opera House was not open. The Court of Queen's Bench were of opinion that his conduct in this respect was not a breach of the covenant; and the judgment of the Court of Exchequer Chamber confirmed that. Upon this point no opinion has been given by the learned Judges, as your Lordships, feeling no doubt upon it, did not think it necessary to put any question to the Judges upon that part of the case. It is quite out of the question to say that that covenant has been broken.

The next covenant is that against assigning, &c., the boxes for more than a year, &c. It appears that he did not grant any lease *for* a longer term than one year or season; he granted a term in futuro; and the Court of Queen's Bench were of opinion that that was not a breach of the covenant, the meaning of which was, that he should let the boxes only for one season; and in that opinion the Court of Exchequer Chamber concurred; and all the learned Judges, in the opinions they have given to us, are unanimous that there was no breach of that covenant. In that opinion I entirely agree.

The third covenant raises a more important question: it is that against charging or encumbering, &c. The breach alleged of that covenant was, that he did grant an encumbrance by giving a warrant of attorney to enter up judgment; that by virtue of that warrant of attorney judgment was entered up, and in consequence of that it was said that he had committed a breach of the covenant by charging the theatre. The Court of Queen's Bench, in their unanimous opinion, which was delivered by Lord Campbell, held that that was a breach of the covenant not to encumber; that every man must be considered as contemplating the result of his acts; that if Lumley gave a warrant of attorney, and the effect of that warrant of attorney was, that under the recent Act of Parliament (the 1 & 2 Vict. c. 110) the property would be charged exactly in the

same way as if he had himself given an equitable charge upon it, he must be considered to have contemplated that result, and that therefore it was a breach of that covenant. That was the opinion which the Court of Queen's Bench expressed upon it. From that there was a writ of error to the Court of Exchequer Chamber. That Court formed a different conclusion: they were unanimously of opinion that that did not fall within the terms of this covenant; and I agree entirely in the view which they took of it; because, if we look at the covenant, it is not that he will do nothing whereby the estate may be encumbered, but it is a covenant that he will not "charge or encumber the theatre, or the term hereby granted, by mortgaging the same"—that is a direct charge—"or by granting any rent-charges"—that is also a direct charge—or by granting "any other encumbrance or encumbrances whatsoever;" that clearly means the same as the former words of the same nature, that he will not grant any direct charge or encumbrance. If the terms of the covenant were, that he would do no act whereby the property should become encumbered, then there is no doubt he would be guilty of a breach of the covenant by giving a warrant of attorney, which, by the operation of the 1 & 2 Vict. c. 110, might cause an encumbrance upon the theatre. The argument "*noscitur à sociis*" applies here, and it is perfectly clear that all the parties meant to do was to guard against the direct encumbrance upon the theatre. In that opinion all the Judges concur. Very good reasons have been assigned by Watson and Bramwell, Bs., and Williams, J., which are pretty much to the same effect as I have stated, for confining that covenant to a direct charge. It is very true that Crompton and Erle,^(a) Js., have given a different opinion. They have adhered to the opinion that they expressed in the Court of Queen's Bench. Coleridge, J., has altered his opinion, and concurs with the great majority of the Judges in thinking that this covenant has not been broken. That disposes of that question. If there has been no breach of the covenant, it is quite unnecessary to consider the other part of the case. One argument was, that although, by the terms of the lease, the lease reserves the right of re-entry, that did not apply to a breach of this covenant. It is unnecessary to say anything more upon that. I am clearly of opinion that it does apply to every breach of covenant—as well to this as to every other breach of covenant; and in that opinion all the Judges who have been consulted upon the subject concur. I am of opinion, therefore, that in this case there has been no breach of that covenant. Upon the first covenant I am most clear in opinion. Upon the second there was a concurrence of all the Judges in both the Courts below—the Court of Queen's Bench and the Court of Exchequer Chamber; and there has been the same concurrence on the part of all the Judges who have given their opinions to us. With respect to the question upon which there was a division of opinion among the Judges—Crompton, J., thinking one way, and the rest of the Judges thinking another—that if there had been a breach of covenant, it was waived by what took place between Mr. Barnes, the solicitor for the defendant, and Mr. Martelli, the agent for the plaintiff—it

(a) This is an error. Erle, J., concurred with the majority of the Judges, and did not allude to any change of opinion, though he formed part of the Queen's Bench when the case was argued. Wightman, J., was the only other Judge who agreed with Crompton, J., as to the second question. (See their opinions, *ante*). *Jurist Rep.*

is quite unnecessary to give any opinion. I do not wish the opinion of those Judges who thought the breach was waived to go forth with my apparent sanction. I certainly entertain considerable doubt whether they are right in coming to that conclusion; but that is more a question of fact than of law. It depends upon the construction that is to be put upon what took place between Mr. Martelli and Mr. Barnes, whether it was really the giving of the sum of money, and the receipt of that money, as rent. The Judges below, and those who have given an opinion to your Lordships, thought that the rule of "*solutio accipitur in modum solventis*" would give a key to the answer. But I cannot myself say that I feel quite satisfied upon that. It may be so; but looking at all that took place between Mr. Martelli and Mr. Barnes, I think it is a question whether the transaction amounted to a payment and receipt of money in satisfaction of rent. Certainly the conduct of both parties leads me to suppose that that cannot be regarded as being the real result of the whole transaction. That, however, is really more a question of fact than of law. I doubt whether I should come to the same conclusion, but it is totally unnecessary for the decision of this case. I only advert to it that it may not be supposed that the rule of law is to be considered as applicable to the present case, that if a person has two debts, and money is paid by him, the creditor is bound to apply it to that particular debt to which the person paying the money chooses to apply it. The question is, whether the sum was paid as compensation for holding the premises, or whether it was paid as rent. It is unnecessary to say more upon that point. I only refer to it for the purpose of saying that I do not assent to that as a proper application of that principle. The contrary argument was very properly pressed by Crompton, J., and I am disposed very much to concur in the view that he took of that part of the case. But it is quite unnecessary for the decision of this case, because I entirely concur with my noble and learned friend, and with the great majority of the learned Judges (all, indeed, except two), that, looking at the particular terms of this covenant, what is aimed at is, direct encumbrances, and not indirect encumbrances. This is not to be considered as a direct encumbrance. If it could be shown, as was done in the second case of *Doe d. Mitchinson v. Carter*, that the parties meant really to evade the terms of the covenant—that they really meant to charge the property, and to use this machinery for charging it—if it were shown that it was their intention that this particular lease should be charged by virtue of a warrant of attorney, then I think that might have an effect equal to an actual charging, because it might be regarded as merely the machinery used for the purpose of carrying the intention of the parties into effect. But there is no pretence for saying, upon the evidence disclosed in the special case, that there was anything of that nature. It appears to be quite otherwise. Nothing was intended but to give a warrant of attorney; and although that warrant of attorney was intended to be acted upon, yet it does not appear that the parties meant to use it as a means of charging the theatre. Therefore I agree that the judgment of the Court below should be affirmed.

Lord CRANWORTH.—I wish to add, that I desire to be understood as giving no opinion with regard to the waiver. It is a matter upon which I wish to guard myself, because I have not very attentively looked into that part of the case, since, in my view, it became unnecessary to do so.

LORD WENSLEYDALE.—What I stated upon this subject was to guard against the supposition that I entirely concurred in the arguments used by the learned Judges who thought that there was a waiver. It seems to be a matter of fact rather than a matter of law, and I am not quite sure that I should have come to the conclusion that the money was received as rent, or that that was the effect that ought to be ultimately ascribed to the transaction.

Judgment for the defendants in error, with costs.

IN THE EXCHEQUER CHAMBER.

WHITE v. CORBETT. *Feb. 16, 1858.*(a)

Where it appears on the face of a bond to secure an annuity, that one of the joint and several obligors is, in fact, a surety only for the other, he is to be looked upon as a surety, and not as a principal, in all questions under the Bankrupt Laws; consequently, his bankruptcy and certificate will not discharge him from liability to pay arrears of the annuity accruing due since his bankruptcy, and unpaid by the principal.

ERROR was brought, by the defendant, on a bill of exceptions, tendered to review the ruling of Martin, B., who directed a verdict for the plaintiff.

The declaration stated that the defendant, by his certain writing obligatory, sealed with his seal, and dated the 5th of March, 1853, acknowledged himself as surety for one John Fletcher Corbett, to be held and firmly bound to the plaintiff in 1000*l.*, to be paid to the plaintiff, which said writing obligatory was, and is, subject to a certain condition; whereby, after reciting that J. F. Corbett had contracted with the plaintiff to grant to him and his assigns a clear annuity or yearly sum of 52*l.* for his natural life, and that the true and bona fide consideration for the purchase of the said annuity was a conveyance to be made by the plaintiff, at the request of the said J. F. Corbett to the defendant, his heirs and assigns, of the estate and interest of him, the plaintiff, of and in certain collieries, hereditaments, and premises, called, &c., pursuant to an agreement, bearing date the 17th of April, 1852; and that the defendant had agreed to join with the said John F. Corbett for the due and punctual payment of the said annuity; and that it had been further agreed that the said annuity or yearly sum of 52*l.* should be further secured by the covenant of the said John F. Corbett and the defendant, in addition to the said bond or obligation, in manner therein and hereinafter mentioned, the condition of the said writing obligatory was, and is declared to be such, that if the said J. F. Corbett and the defendant, or either of them, their or either of their heirs, executors, or administrators, or any or either of them, did and should henceforth, during the natural life of the plaintiff, well and truly pay, or cause to be paid, unto the plaintiff, his executors, administrators, or assigns, one annuity or clear yearly sum of 52*l.*, to commence, and to be computed as commencing from the 5th of March, 1853, by equal quarterly payments, on the 5th of June, the 5th of September, the 5th of December, and the 5th of March, in each and every year, clear of all deductions on any account whatever, and did and should make the first of such

(a) 28 L. J., Q. B. 228. Before Cockburn, C. J., Williams, J., Crowder, J., Willes, J., Bramwell, B., Watson, B., and Channell, B.

quarterly payments on the 5th of June next ensuing the date of the said bond or obligation, if the plaintiff should be then living, and in the event of the death of the plaintiff between or in the interval of any of the said quarterly days of payment, and either before or after the said 5th of June then next, then, if the above bounden J. F. Corbett, and the defendant, or either of them, their or either of their heirs, executors, or administrators, or any or either of them, did and should well and truly pay, or cause to be paid, to the executors, administrators, or assigns of the plaintiff, such part of the said annuity of 52*l.* as should be in proportion to the time or number of days which, inclusive of the day of the decease of the plaintiff, should have elapsed prior to his decease, and after the day of payment next and immediately preceding that event, or as the case should require, next after the day of date of the said bond, if the plaintiff should die prior to the said 5th of June then next, and if the said J. F. Corbett, or the defendants, or either of them, their or either of their heirs, executors, or administrators, should pay such proportional part of the said annuity of 52*l.* as soon after the decease of the plaintiff as demand should be made thereof by the executors, administrators, or assigns of the plaintiff, then and in such case, the said bond or obligation should be void and of none effect, or otherwise should be and remain in full force and virtue; and for the consideration thereinbefore expressed, and for the further and better securing the due and regular payment to the plaintiff, his executors, administrators, and assigns, of the said annuity or yearly sum of 52*l.* on the 5th of June, the 5th of September, the 5th of December, and the 5th of March, in each and every year during his natural life, the defendant did thereby for himself covenant, promise, and agree to and with the plaintiff, his executors, administrators, and assigns, in manner following, that is to say, that they the said J. F. Corbett, the defendant, or one of them, their heirs, executors, administrators, or some or one of them, should and would well and truly pay or cause to be paid unto the plaintiff, his executors, administrators, or assigns, the said annuity or yearly sum of 52*l.* thenceforth during the natural life of him, the plaintiff, on the said quarterly days of payment in manner aforesaid, and according to the intent and meaning of these presents, clear of all deductions on any account whatsoever, and should and would make the first of such quarterly payments on the 5th of June next ensuing the date thereof, if the plaintiff should be then living, and in the event of the death of the plaintiff between or in the interval of any of the said quarterly days of payment, and either before or after the 5th of June then next, should and would well and truly pay, or cause to be paid, unto the executors, administrators, or assigns of the plaintiff, such part of the said annuity of 52*l.* as should be in proportion to the time or number of days which, inclusive of the day of the decease of the plaintiff, should have elapsed prior to his decease, and after the day of payment next and immediately preceding that event, as the case should require, and should and would pay such proportionate part of the said annuity of 52*l.* as soon after the decease of the plaintiff as demand should be made thereof by the executors, administrators, or assigns of the plaintiff, clear of all deductions whatsoever, and according to the true intent and meaning of these presents, and of the said bond or obligation; and the defendant did thereby covenant, promise, and agree to

and with the plaintiff, his executors, administrators, and assigns, that the said J. F. Corbett and defendant, and each of them, would, whenever required by the plaintiff or his assigns, execute an assurance to him, the plaintiff, his executors, administrators, and assigns, of and upon any real and personal estate which they or either of them, the said J. F. Corbett and the defendant, might thereafter become jointly or severally seised or possessed of, either by purchase, descent, gift, or otherwise, other than and except the said collieries and premises, called, &c., for the better securing the said annuity to him, the plaintiff, his executors, administrators, and assigns, as by his or their counsel might be advised and required. And for assigning six breaches of the said condition of the said writing obligatory, the plaintiff saith, that although the plaintiff and the said J. F. Corbett and the defendant are still living; and that although after the making of the said writing obligatory and during the natural life of the plaintiff, divers, to wit, six of the said quarterly payments of the said annuity became due and payable, according to the true intent and meaning of the said condition; and although the plaintiff has done all things necessary, and all conditions have happened and been performed necessary to enable the plaintiff to have the said quarterly payment of the said annuity paid to him according to the said condition, yet the same were not, nor were any or either of them, or any part thereof, paid by the defendant and the said J. F. Corbett, or either of them; but the same and every part thereof still remain in arrear and unpaid, contrary to the effect of the said condition of the said writing obligatory, and the said covenant of the defendant in that behalf made as aforesaid.

The defendant pleaded his bankruptcy and certificate, and that the alleged claim accrued to the plaintiff before he, the defendant, became bankrupt. Issue was joined thereon.

At the Gloucester Summer Assizes, 1857, before Martin, B., the following matters were proved:—The bond as set forth in the declaration was put in. It was shown that default had been made in the payment of the first instalment, which became due on the 5th of June, 1853, but that the amount had been subsequently paid to the plaintiff and accepted by him before the defendant's bankruptcy; that J. F. Corbett paid the second instalment, and that default was made in payment of all the instalments that became due after the second; but that all these, save one, were subsequently and before the defendant's bankruptcy, paid and accepted by the plaintiff; that the defendant became a bankrupt in January, 1856, and that then there was an instalment due and unpaid, which was not paid until the month of June following; that the defendant obtained his certificate of bankruptcy in February, 1857. An arrear of 78*l.* in respect of the annuity had accrued due since the bankruptcy of the defendant. It was further shown that the consideration for the annuity secured by the bond was the conveyance of the collieries and premises as stated in the defeasance, and that the defendant had the whole benefit of them.

Upon this evidence the learned Judge directed the verdict to be entered for the plaintiff for 78*l.*

Whereupon the defendant's counsel tendered a bill of exceptions to the direction of the learned Judge.

Phipson, for the plaintiff in error, the defendant below (Feb. 2, 1858).

—The bill of exceptions has been tendered in this case to review the decision of the Court of Queen's Bench in *Amot v. Holden*, 18 Q. B. 593 (E. C. L. R. vol. 83), in which Lord Campbell, C. J., and Erle, J., in opposition to Wightman, J., decided that where the bond showed the defendant to be a surety, his bankruptcy was no answer to an action for subsequent arrears of the annuity. It is submitted that the bankruptcy and certificate of the defendant was a good answer to the action for these arrears. The plaintiff is an annuity-creditor, and the defendant is an annuity-debtor within the meaning of section 175 of the statute 12 & 13 Vict. c. 106, the Bankruptcy Consolidation Act. Though the recitals show the defendant to be a surety, yet by the operative part of the bond he is a principal. The defendant is clearly a debtor by virtue of his covenant. The following cases were cited: *Caldwell v. Becke*, 2 Exch. 318,† *Harrison v. Matthews*, 10 M. & W. 768,† *Browne v. Lee*, 6 B. & C. 689 (E. C. L. R. vol. 13), *Baxter v. Nichols*, 4 Taunt. 90, *Ex parte Thompson*, Mont. & B. 219, *Thompson v. Thompson*, 2 Bing. N. C. 168 (E. C. L. R. vol. 29), *Ex parte Marshall*, 1 Mont. & Ayr. 118, and *Ex parte Marks*, 3 Ibid. 521.

Dowdeswell, for the defendant in error, the plaintiff below.—The plaintiff is not an annuity-creditor of the defendant within the meaning of section 175 of the Bankrupt Act. The defendant is a mere surety. The case falls within section 176 of that Act. The certificate of discharge in bankruptcy is no answer to this action. The fact that an action of debt would lie against the defendant is not the criterion as to the defendant's liability. The recital and the condition of the bond show clearly that the defendant is in reality only a surety for J. F. Corbett, the grantor of the annuity. The grantee of the annuity had notice of the real nature of the transaction, and is affected by the equities arising out of it: *Pooley v. Harradine*, 7 E. & B. 431 (E. C. L. R. vol. 90). The Court of Bankruptcy is bound to take notice of the relation of principal and surety existing here. *Ex parte Marks and Johnson v. Compton*, 4 Sim. 37, show that the plaintiff could not prove for the value of the annuity under the defendant's bankruptcy. *Taylor v. Young*, 3 B. & Ald. 521 (E. C. L. R. vol. 5), was referred to.

Phipson replied.

Cur. adv. vult.

Judgment was now delivered by

MARTIN, B.—This case was brought before this Court in order to have the decision of *Amot v. Holden* reconsidered and overruled. In that case (which does not appear to differ in any essential respect from the present) it was held by Lord Campbell, C. J., and Erle, J. (Wightman, J., *dissentiente*), that the defendant's liability on a bond, framed in the same way substantially as that on which this action is founded, was that of a surety only, and that the other joint and several obligor was the principal and the grantor of the annuity; and that the plaintiff, the obligee of the bond, had not a debt provable under the defendant's bankruptcy; consequently that his certificate was no bar to the action. The question was, as it is in the case before us, whether, having due regard to the language of the instrument, the defendant ought to be considered as a principal or as a surety. We agree with the majority of the Court of Queen's Bench in thinking that he ought to be considered as a surety only. Even if in a Court of law he might be treated as a principal, yet in a Court of equity he certainly would be regarded as a

surety; and we think that the bankrupt law is to be administered with reference to the equitable as well as the legal position of the parties. On these grounds we were prepared to give judgment for the plaintiff below: but the case of *Warburg v. Tucker*, antè, p. 914, occurred, and the argument of that case in this Court suggested the question, whether the bond now declared on might not have been proved as a contingent liability under the statute 12 & 13 Vict. c. 106, s. 178. This point did not arise in *Amot v. Holden*, as the bankruptcy there was under the statute 6 Geo. 4, c. 16, which did not contain the provision which is to be found in the statute 12 & 13 Vict. c. 106, s. 178. On this consideration this Court desired that the present case might be re-argued. But these doubts being resolved by the case of *Boyd v. Robins*, 5 C. B. N. S. 597 (E. C. L. R. vol. 94), decided in this Court last term, that case is an authority against the defendant. There is, therefore, no need for a further argument, and our judgment must be for the plaintiff.

Judgment affirmed.

CURLEWIS v. THE EARL OF MORNINGTON. May 24, 1858.(a)

An administrator de bonis non has a right to bring error on a judgment obtained against a prior administrator of the intestate, and he may commence his proceeding by taking out a writ of *scire facias ad audiendum errores* in the court in which the judgment has been recovered.

THIS was a rule obtained, by the plaintiff, to set aside a writ of *scire facias ad audiendum errores*, obtained by one Richardson, who had been appointed administrator de bonis non in the place of the defendant, against whom, as administrator, the original judgment had been recovered, but who had died since. Richardson had issued this writ with a view of taking proceedings in error to reverse the judgment.

Hayes, Serjt., showed cause (May 7).

T. Jones supported the rule.

The points raised are fully noticed in the judgment.

Cur. adv. vult.

COLERIDGE, J., now said—This was a rule argued before me, in the Bail Court, in Easter Term last, which called upon Mr. Richardson, the administrator of the goods of the Hon. James T. H. S. L. Wellesley, left unadministered by the defendant, to show cause why the writ of *scire facias ad audiendum errores* issued herein, should not be set aside. Two points only were discussed in the argument: the first, whether the administrator de bonis non had any right to sue out a writ of error at all on a judgment obtained against the administrator; the second, if that were answered in the affirmative, whether the present were the right mode of proceeding. It was admitted on both sides, the general rule to be found in *Bac. Abr. Error*, B., and in the notes to *William v. Gwyn*, 2 Saund. 46 b, was the true rule, and applicable here, namely, that no person can bring a writ of error to reverse a judgment who was not party or privy to the record, or who was not injured by the judgment, and therefore would receive benefit by the reversal thereof. Nor

¹ (a) In the Bail Court, 27 L. J., Q. B. 269, 4 Jurist, N. S. 535.

was it disputed that this rule, though laid down in negative terms, is to be applied affirmatively; so that any one may bring the writ who falls within either of the predicaments above stated, that is, who is either original party, or privy to, or prejudiced by the judgment. But it was contended that as the administrator de bonis non was no party to the judgment against the first administrator, so is he not privy to it, because he comes in by title paramount; and *Sulpe v. Norgate*, Cro. Car. 167, was cited, where a judgment de bonis testatoris having been obtained against an executor, who died intestate before satisfaction, it was said that an administrator de bonis non could not have a scire facias to enforce a judgment by the executor, for because he came paramount the judgment, and was not party thereto, though it was held that where a judgment (as in that case) was against an executor for the testator's debt, and he died intestate before satisfaction had, this judgment might be executed by scire facias against the administrator of the testator, who cometh in place of the executor, and being for the debt of the testator, is liable thereto; and although the 17 Car. 2, c. 8, has remedied the inconvenience for the administrator de bonis non, giving him a scire facias on a judgment for the executor or first administrator, this remedy is not extended conversely against the administrator de bonis non. The case, however, shows that no such remedy was needed, and it seems to me that the judgment is material here against the rule; because it establishes the liability of the administrator de bonis non upon the original judgment; and, therefore, whether he is to be considered as privy to it or not, he is clearly one who in his representative character, which alone is here to be considered, will be prejudiced by it. The judgment here is against the goods of the intestate; these are now in the hands of the administrator de bonis non, and will be diminished to the amount of the judgment, if it remains unreversed, and it would be an extraordinary thing if at common law the judgment might be enforced against the administrator de bonis non, and yet that if erroneous he should have no means of reversing it. No authority directly in point could be produced by the learned counsel who argued this case; but where the principle is clear, and the reason of the thing all one way, some authority against the proposition was requisite before I could hold in the negative.

It remains therefore to consider; whether it is right to proceed, as in this case, by a writ of scire facias ad audiendum errores. By the Common Law Procedure Act, 1852, s. 148, it is enacted that a writ of error shall not be necessary or used in any cause; and the proceeding to error shall be a step in the cause, and shall be taken in manner thereafter mentioned. The next following section, with the form in the schedule A, prescribes the manner, which is by a simple memorandum, entitled in the Court and cause, signed by the party or his attorney, alleging that there is error, a copy whereof may be served on the opposite party or his attorney. The 152d section does away with the old assignment of and joinder in error, and substitutes a suggestion to the effect that error is alleged by one party and denied by the other, to be entered on the judgment-roll. All these proceedings are in the Court below, and are not applicable to cases in which there is a change of party subsequent to the judgment complained of. Nor can I find that case provided for by any other clause of the statute. We are therefore driven to apply the old proceeding in such a case, as well as we can, to a statute

of things in which there is no form no writ of error, and no assignment of error, but a simple allegation on the record that there is error, and a denial of it. Now, by the rule of Hill. T. 4 W. 4, pl. 13, the scire facias ad audiendum errores was done away with, only as between the immediate parties: it was preserved in case of a change of parties; and of course it must issue out of the court in which the record lies. In the present case that is this Court, the roll not having at this stage been removed into the Court of error. A writ has therefore been preserved especially to meet the circumstances which exist in the present case. Some such machinery is clearly necessary, in order to introduce the new party on the record, and to give the other side an opportunity of denying the existence of the title on which the new party rests his right to take up the pending litigation. Either this mode must be had recourse to, or a suggestion. There is no more authority for the latter than the former; and any argument now used against the scire facias might probably be equally available against the proceeding by a suggestion, if that had been had recourse to. In the case of *Bosanquet v. Ransford*, 11 Ad. & E. 520 (E. C. L. R. vol. 39), where the law was much considered as between the use of a scire facias and of a suggestion (the judgment in which was adopted both in the Common Pleas and Exchequer), this Court laid it down as a general rule, that scire facias was the proper mode to pursue for the introduction of new parties; suggestion only being applicable to the alleging of collateral facts affecting the same parties. This, then, is an authority for the use of a scire facias. But it is said, and truly, that the writ assumes the previous issue of a writ of error; as it recites that manifest error has intervened, "as by the complaint of, &c., we are informed." It was understood upon the argument, that an application was made to amend the writ, if any amendment were necessary, and could properly be made; but it seems to me that this allegation is mere surplusage, not traversable, and requires no amendment. I cannot upon the whole see that this mode of proceeding is not right: it imposes no hardship on the defendant in error; and is perhaps the most free from formal objection of any that could have been adopted. The rule, therefore, must be discharged—but, the question being new, without costs.

Rule discharged.



AN

INDEX

TO

THE PRINCIPAL MATTERS.

(The additional cases in this volume are indexed in [].)

William

ACTION.

I. When it lies, and does not lie, in particular cases.

i. When it lies.

- (1). For libel, against a corporation aggregate, 115. **LIBEL**, I. (1).
- (2). Trover, against executrix, by assignees of testator, for a life policy assigned by him, inter alia, to them for the benefit of creditors, 75. **ASSIGNMENT**, I.
- (3). Ejectment, by two tenants in common jointly, 81. **COMMON LAW PROCEDURE ACTS**, I. iii.
- (4). For deceit, and for money had and received: which is the proper remedy, when the contract is rescinded by plaintiff on the ground of fraud, 148. **CONTRACT**, VI. v. (2).
- (5). For negligence, by servant against master, for an accident occurring in the course of the service, 102. **MASTER AND SERVANT**, I.
- (6). By husband, as administrator of wife, under stat. 9 & 10 Vict. c. 93, for negligence causing her death: proper form of declaration, 168. **EXECUTOR**, I.
- (7). Against landlord, by tenant, for detaining goods under distress, after sufficient tender before impounding, 507. **LANDLORD AND TENANT**, II.
- (8). Against a sheriff, for wrongful seizure of goods, by a party whose legal title accrued, by relation, before the seizure, 806. **CONTRACT**, VI. iv.
- (9). For breach of promise of marriage.

Plea, that before breach defendant became afflicted with a disease making it dangerous for him to marry, held bad, 746. **CONTRACT**, VI. i.

- (10). For breach of promise of marriage. Plea, that before agreement plaintiff and a third party had agreed to marry, which agreement was still in force, and had been withheld from plaintiff: held bad, no fraud being averred, 796. **CONTRACT**, VI. v. (1).

- (11). By a passenger against the owners of a crew, paid by them, and supplied with the ship, to a third person for hire, for the negligence of such crew, 899. **MASTER AND SERVANT**, II.

ii. When it does not lie.

- (1). On behalf of an infant of tender years, for injury caused by the joint negligence of defendant and the party who had charge of the infant, 719. **NEGLIGENCE**, I. ii.
- (2). For money had and received, by transferee of shares, on the ground of failure of consideration, to recover back the purchase-money, paid by him with full knowledge of the facts, 887. **CONTRACT**, VI. vii.

II. Limitation of. **STATUTE OF LIMITATIONS**.

III. Proceedings before trial.

i. Notice of action.

Action against a railway company. Plea, that a month's notice of action was not given, as prescribed by the special Act: proper form of, 837. **RAILWAYS CLAUSES CONSOLIDATION ACT**.

ii. Writ of summons.

(1111)

- Action on a judgment. Particulars may be endorsed on the writ, and judgment signed on non-appearance, under sects. 25, 27, of The Common Law Procedure Act, 1852, 884. COMMON LAW PROCEDURE ACTS, I. (1).
- iii. Pleading. PLEADING.
- IV. Proceedings at trial.
- i. Evidence. EVIDENCE.
- ii. Damages. DAMAGES.
- V. Proceedings after trial.
- Costs. COSTS.

ADJUDICATION.

Of settlement. POOR.

ADMINISTRATOR.

EXECUTOR AND ADMINISTRATOR.

AGENT.

PRINCIPAL AND AGENT.

ALLOCATOR.

COSTS.

APPEAL.

I. Right of.

i. To the Superior Courts.

(1). Does not lie to Q. B. against the taxation of costs by registrar of county court, under stat. 19 & 20 Vict. c. 108, s. 34. Q. B. will dismiss with costs, 123. COUNTY COURT, I. (2).

(2). Appeal from county court, under stat. 13 & 14 Vict. c. 61, s. 14. Security for costs, within what time to be given, 504. COSTS, II.

ii. To Quarter Sessions.

From the decision of Petty Sessions, as to the utility of a highway, by the parties dedicating, 69. HIGHWAY ACT, I.

II. Notice of.

Appeal against an order of removal: within what time it may be made. Rule as to notice of trial and entry of appeal.

Parties appealing against an order of removal are entitled to take the full number of days given by stat. 11 & 12 Vict. c. 31, s. 9. If at the expiration of those days there is time to give effectual notice of trial for the next sessions, it should be done; if there is not time for such notice of trial, the appeal, if it be practicable, ought to be entered and respited at the next sessions; and it is too late to enter it at a subsequent sessions. *Regina v. Justices of West Riding*, 713

III. Proceedings at.

i. In Superior Courts.

Case stated, under stat. 20 & 21 Vict. c. 43. Notice to respondent: when appellant may be heard, on non-appearance of respondent, 469. PAWNBROKER.

ii. At Quarter Sessions.

Magistrates cannot determine, when interested, 100. JURISDICTION, III. (1).

IV. Application to Q. B. for mandamus to Quarter Sessions to enter continuances and hear appeal: within what time to be made, 253. MANDAMUS, II.

APPELLANT.

APPEAL.

APPRENTICESHIP.

Settlement by. POOR, I. i. (2).

ARREST.

I. Capias under stat. 1 & 2 Vict. c. 110: when fraudulent and illegal.

A creditor, by a concerted fraud, induced his debtor, who resided abroad, to come to England, and immediately had him arrested by order of a Judge. The facts being made to appear by affidavit, this Court, by rule, set aside the whole, as an abuse of the process of the Court. *Stein v. Valkenburgh*, 65

II. What is a sufficient taking to constitute an arrest.

A sheriff's officer, in execution of a ca. sa., put his hand into the debtor's dwelling-house, by an opening in a window caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor who was inside the house, and said, "You are my prisoner." He was unable then to secure the person of the debtor; but he thereupon broke open the outer door of the house, and seized the debtor.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the officer had acted legally, the arrest having been effected by touching the debtor, and the subsequent breaking of the outer door being justifiable for the purpose of taking into custody the debtor so arrested. *Sandon v. Jervis*, 935

ASSIGNMENT.

I. To trustees, for benefit of creditors, of "all personal estate and effects," and "all writings," &c. Trover by trustees against executrix of assignor, for a policy on his life: measure of damages.

A., by deed, conveyed all his property to trustees for the benefit of his creditors. The conveyance contained general words, amongst others "all and singular other the personal estate and effects whatsoever," and all "writings" belonging to the same.

He was possessed, at the time, of a policy

of insurance on his own life, the existence of which was not known to the trustees, and which remained in his possession. He died: the trustees, having afterwards learned the existence of the policy, claimed it from his executor, who refused to deliver it up, and who obtained the money from the insurance office.

Held, by the Exchequer Chamber, affirming the judgment of the Court of Q. B., that the legal property in the writing, and the beneficial interest in the contract, passed to the trustees by the deed; that they might maintain trover for the policy against the executor; and that the proper measure of the damages under the circumstances was the amount of the money obtained by it. *Watson v. McLean*, 75

II. By a client to his attorney, of the subject-matter of a suit, as security for costs: not void for champerty or maintenance, 806. CONTRACT, VI. iv.

III. Of life policy, and covenant to pay the premiums: does not constitute a liability to pay money upon a contingency, within sect. 178 of stat. 12 & 13 Vict. c. 106, 914. BANKRUPT LAW CONSOLIDATION ACT.

ASYLUM.

County Lunatic. Poor, I. i. (1).

ATTORNEY.

I. Employed by Commissioners elected annually under a local Act: his rights and remedies as against subsequent Commissioners, 107. CONTRACT, II.

II. Actions by, on two separate bills of costs: consolidation, 243. COSTS, III. i. (3).

III. Assignment to, by client, of the subject-matter of a suit, as security for costs, 806. CONTRACT, VI. iv.

AUCTION.

VENDOR AND VENDEE, III.

AUDITORS.

I. Poor Law. Poor, II. ii.

II. For parish, under Metropolis Local Management Act. METROPOLIS LOCAL MANAGEMENT ACT, IV.

BANKRUPT LAW CONSOLIDATION ACT, 1849.

(12 & 13 Vict. c. 106).

I. Sect. 178. Liability to pay money on a contingency: proof of demand. Does not apply to a claim upon a covenant to pay the premiums of life policies assigned as security.

Defendant, being indebted to plaintiff, assigned to him, as security, an insurance

on defendant's life, and an insurance on the life of defendant's wife, and covenanted to pay the premiums. Plaintiff sued defendant on this covenant, assigning as a breach that defendant had not paid the premiums. Defendant, to this breach, pleaded his bankruptcy and certificate, averring that they had occurred after the execution of the deed, but not that they had occurred after the breaches had taken place.

Held, on demurrer to the plea, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the plea gave no answer to the declaration, the claim not being in respect of, nor a liability to pay money upon, a contingency, within sect. 178 of The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. *Warburg v. Tucker*, 914

[II. Sect. 178 applies to surety on bond to secure annuity.

Where it appears on the face of a bond to secure an annuity, that one of the joint and several obligors is, in fact, a surety only for the other, he is to be looked upon as a surety, and not as a principal, in all questions under the Bankrupt Laws; consequently, his bankruptcy and certificate will not discharge him from liability to pay arrears of the annuity accruing due since his bankruptcy, and unpaid by the principal. *White v. Corbett*, 1103]

BARON AND FEME.

HUSBAND AND WIFE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Forms of.

(1). Bill of exchange drawn upon a limited company, "signed" by their officer, within sect. 31 of The Joint Stock Companies Act, 1856.

P. directed a bill to a company of limited liability by the name of The S. W. Steam Packet Company, its full name being the S. W. Steam Packet Company, Limited. J. M., who was secretary to the company, wrote across it "Accepted, payable at Messrs. B. & Co., J. M., secretary to the said company." The bill was not honoured.

Held, on demurrer to a plea, that J. M. was personally liable to P. under The Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 31. *Penrose v. Martyr*, 499

(2). Promissory note. "As per memorandum of agreement."

"I promise to pay to J. S. or his order, at three months after date, the sum of 100*l*. as per memorandum of agreement. II. B."

Held, that a promissory note in this form was, on the face of it, an unconditional

promise to pay, and was negotiable under stat. 3 & 4 Ann. c. 9.

If the effect of the agreement be to make the promise conditional, it is on the defendant to show that, by setting out the agreement in his plea. *Jury v. Barker*, 459

II. Action on.

Action by payees of a promissory note against joint and several makers. Plea, that one of plaintiffs was one of joint makers, and therefore liable to contribution; held bad.

Action by A. and B., payees of a joint and several promissory note, against C., one of the makers. Plea, that the said note was made (setting it out) by B., one of the plaintiffs, the defendant, and another: and that the defendant, in case the plaintiffs were to recover from him in that action the amount of the said note, would be entitled to call on B. for contribution.

On demurrer, held a bad plea, as being no answer to the action upon the several contract by C.

Semble, per Lord Campbell, C. J., that, even if the plea had been good, a replication, averring that the plaintiffs made the said note only as sureties for third parties, would have been a good answer. *Beecham v. Smith*, 442

BIRTH SETTLEMENT.

Poor, I. l. (1).

BOARD OF WORKS.

Under Metropolis Local Management Act. METROPOLIS LOCAL MANAGEMENT ACT, I.

BOND.

I. Bond charging poor-rates with repayment, in five years of expenses of parish survey: held a charge on the poor-rates generally, 246. RATE, IV.

II. Bond by principal and surety, for due performance by the former of the office of treasurer to a borough, appointed under stat. 5 & 6 W. 4, c. 76. Duration of surety's liability, 660. MUNICIPAL CORPORATIONS REFORM ACT, II.

III. Bond not to practise as a surgeon within certain limits. Assessment of damages for breach of condition, 563. DAMAGES, III.

BREACH.

Of condition in a bond not to practise as a surgeon within certain limits. Assessment of damages, 563. DAMAGES, III.

BREACH OF PROMISE OF MARRIAGE.

CONTRACT, VI. i. v.

BUILDING ACT.

Metropolitan. METROPOLITAN BUILDING ACT.

BURGESS LIST.

MUNICIPAL CORPORATIONS REFORM ACT, I.

BURIAL ACTS.

(15 & 16 VICT. c. 85. 16 & 17 VICT. c. 134. 18 & 19 VICT. c. 128).

Stat. 15 & 16 VICT. c. 85.

Sects. 10, 52. What is a "parish" for which a Burial Board may be formed.

Stat. 15 & 16 VICT. c. 85, authorizing the formation of a Burial Board in a "parish," is applicable to a parish not having separate overseers, nor separately maintaining its poor. Sect. 52, the interpretation clause, extends the meaning of the word to places, not parishes, having separate overseers and separately maintaining their own poor, but does not exclude parishes which, for any reason, do not fulfil those conditions. *Regina v. Sudbury Burial Board*, 264

CAPIAS.

ARREST.

CARRIERS.

Action for negligence against railway company, as carriers: pleas of "special contract" and "just and reasonable" "condition" under the Railway Traffic and Canal Act. Evidence explanatory of "not insured."

The agent of plaintiff, by his orders, delivered to defendants, a railway company, some marbles for carriage; and, in answer to inquiries by defendants as to the terms upon which the marbles were to be carried, wrote to defendants, inquiring the "rate of insurance on marble." Afterwards, one W., on behalf of the agent, had an interview with defendants, who informed him of their charges for carrying marbles uninsured and insured, respectively. A printed notice of conditions had been previously sent to the agent by the defendants. One of the conditions was "that the company shall not be responsible for the loss of or injury to any marbles" "unless declared and insured according to their value." W., after the interview, and after the conditions had been sent to the plaintiff's agents, wrote to defendants, signing on behalf of the agents, "Please to forward the three cases of marble, not insured, as directed, to," &c. The marbles were forwarded by defendants, and while on their premises, were damaged, without wilful negligence of defendants. Plaintiff sued defendants, as common carriers, for the damage. Defendants pleaded, among other things: 4, that the marbles were delivered under a special contract, signed by the person delivering them (setting out the contract in the terms of the printed condition), and that they were not declared or insured, &c.; 5, that the marbles were delivered sub-

ject to a reasonable condition (setting out the printed condition as before) made by defendants, and assented to by plaintiff, and that they were not declared or insured, &c. The Judge, at the trial, held the condition to be reasonable.

Held, by the Court of Q. B. (Lord Campbell, C. J., and Crompton, J., dissentiente Erle, J.), 1. That W.'s letter did not, upon the face of it, amount to a "special contract" to the effect stated in plea 4, within the 4th proviso of sect. 7 of the Railway Traffic and Canal Act, 17 & 18 Vict. c. 31: that oral evidence was not admissible to show that the words "not insured" must have been intended by plaintiff to refer to the printed conditions of the company with respect to uninsured marbles: and that therefore the 4th plea was not proved. 2. That the condition in the 5th plea mentioned could be binding only as a special contract with respect to receiving, forwarding, and delivering goods, and therefore required to be signed, under the 4th proviso in sect. 7, by the owner or the person delivering: that the 5th plea was therefore bad and plaintiff entitled to judgment on it: and, further, that, as there was no binding assent, as alleged, by the plaintiff to such condition, plaintiff was entitled to the verdict on that plea also. Judgment for the plaintiff.

Held, by the Exchequer Chamber (Pollock, C. B., Martin, B., Watson, B., Channell, B., and Willes, J., dissentiente Williams, J.), reversing the judgment of the Court of Q. B. as to the 4th plea (the 5th having been abandoned on argument), that the 4th proviso, as to signed special contracts, in sect. 7 of stat. 17 & 18 Vict. c. 31, referred to contracts of the same kind as those mentioned in sect. 6 of the Carriers Act, 11 G. 4 & 1 W. 4, c. 68.

That the letter of W., signed on behalf of the persons delivering the goods, coupled with the forwarding of the marbles in pursuance of that letter, constituted a sufficient special contract in the form prescribed by the 4th proviso in sect. 7 of stat. 17 & 18 Vict. c. 31.

That that letter might be read with reference to the other correspondence and evidence given at the trial:

And that, so read, or read either by itself, or according to the ordinary understanding of language used between carriers and their customers, or with reference to the general provisions of the Carriers Act, the terms of the contract were those alleged in the plea; and that the 4th plea was therefore proved. *Peck v. North Staffordshire Railway Company*, 958

CASE STATED.

Under stat. 20 & 21 Vict. c. 43. Notice to

respondent: proceedings on his non-appearance, 469. PAWNBROKER.

CERTIFICATE.

Under Customs Clauses Consolidation Act. CUSTOMS CLAUSES CONSOLIDATION ACT.

CERTIORARI.

When it lies, and does not lie, in particular cases.

I. Lies to quash the confirmation, by Quarter Sessions, on appeal, of a conviction, when some of the magistrates at Quarter Sessions are interested, 100. JURISDICTION, III. 1.

II. Will not be granted, for the purpose of bringing error on the record of a conviction in a colonial court, for a criminal offence, without the Attorney-General's fiat, 828. ERROR.

CHAMPERTY.

CONTRACT, VI. iv.

CHARTER-PARTY.

SHIP, IV.

CHATELS.

Of felons. FELON.

CLERK.

Appointed by Commissioners elected annually under a local Act: his rights and remedies against subsequent Commissioners, 107. CONTRACT, II.

CLERK OF THE PEACE.

For Westminster. His present duties and emoluments, under stat. 7 & 8 Vict. c. 71.

Stat. 7 & 8 Vict. c. 71, after abolishing the sessions for the City and Liberty of Westminster, and directing that the county sessions for Middlesex shall be holden by adjournment within the City and Liberty, enacts, by sect. 12, that the persons holding the several offices of high bailiff of Westminster, clerk of the peace, and all other officers of the court of sessions of the peace for the said City and Liberty, shall, so long as they shall be entitled to hold their several offices, execute the duties and be entitled to the emoluments, within the said City and Liberty, of the several offices of sheriff, clerk of the peace, and other corresponding officers of the county of Middlesex.

Held, that this extends only to the persons holding the offices in the City and Liberty at the time of the act passing. By the Court of Exchequer Chamber, the Court of Q. B. having been equally divided. *Nicholson v. Ellis*, 267

COLLECTOR.

Of poor-rates. RATE III. (1).

COLLOQUIUM.

EVIDENCE, II. ii.

COMMISSION.

To examine witnesses, directed by one of the Superior Courts to a foreign tribunal.

A commission, having been issued in this cause addressed to individual commissioners to examine witnesses at Pesth, was sent back, unexecuted, through the Austrian embassy, on the ground that the Austrian Government did not permit any but the tribunals of the country to examine witnesses in Hungary. This Court made absolute a rule directing a commission to issue directed to the Imperial Royal Provincial Court at Pesth, to examine the witnesses. *Fischer v. Isataray*, 321

COMMON LAW PROCEDURE ACTS.

(1852: 15 & 16 Vict. c. 76.

1845: 17 & 18 Vict. c. 125.)

I. 1852.

- i. Sects. 25, 27. Endorsement of particulars. Judgment on non-appearance.

In an action on a judgment, the plaintiff may endorse the particulars on the writ of summons, under sect. 25 of The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and on non-appearance, sign judgment under sect. 27. *Hodsoll v. Baxter*, 884

- ii. Sect. 61. Schedule (B.) Proper form of declaration in libel or slander, 346. EVIDENCE, II. ii.

- iii. Sect. 169. Schedule (A.), No. 13, s. 180. Joinder of tenants in common in ejectment.

Under sect. 169, Sched. (A.) No. 13, and sect. 180, of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), two tenants in common may join in a writ of ejectment, stating that they, or some or one of them, claim to be entitled: and the whole of the property to which they are entitled in common may be recovered on such writ. *Ellies v. Ellies*, 81

II. 1854.

- i. Sects. 60, 67. Garnishee clauses. What is a "debt."

The garnishee clauses in The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 60, 67), apply only where there is an existing debt due from the garnishee to the judgment-debtor, though the time of payment may be postponed. Therefore this Court refused a rule to attach the amount for which the judgment-debtor had obtained a verdict against a third person in an action for unliquidated damages, no judgment having been yet signed, and the amount therefore not being a debt. *Jones v. Thompson*, 63

- ii. Sect. 85. Equitable replications, by real plaintiff, bringing action in the name of a

nominal plaintiff, to pleas of payment, &c., to such nominal plaintiff.

Declaration by shipowner, upon a charter-party, for non-payment of freight by charterer, and on a common count for money payable for freight and on an account stated.

Pleas: 1, to first count, discharge of defendant by plaintiff before breach. 2, to residue of declaration. Payment 3, (on equitable grounds) to whole declaration, parol release of plaintiff by defendant after cause of action accrued. Replications, on equitable grounds, to these pleas: That before cause of action accrued, and before release or discharge of defendant by plaintiff, or payment, all the right, title, and interest of plaintiff in the said ship, and in the said charter-party, was assigned to S., and then became, and are now, vested in him, of which defendant had notice before the alleged release or discharge of defendant by plaintiff, or payment: that plaintiff released and discharged defendant, and made the payment, without the authority, knowledge, or consent of S.; that the release and discharge were given by the plaintiff to defendant, and obtained by defendant from plaintiff, and the payment made, fraudulently, and with the intent to defraud S., and prevent him from recovering in respect of the said causes of action: and that the action was brought by S. in the name of plaintiff, on behalf of S.: that plaintiff had no interest in the said action, and that it had been commenced and carried on for the sole use and benefit, and at the sole expense and cost, of S.

On demurrer, held a good replication on equitable grounds, within sect. 85 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). *De Potthor v. De Mattos*, 461

COMPANY.

I. Construction of Acts relating to companies.

- i. Waterworks Clauses Act (10 & 11 Vict. c. 17).

What is water for domestic use, within sect. 35, 176. WATERWORKS.

- ii. Railways Clauses Consolidation Act (8 & 9 Vict. c. 20).

What is the "principal office" of a railway company, within sect. 138, 837. RAILWAYS CLAUSES CONSOLIDATION ACT.

- iii. Railway Traffic and Canal Act (17 & 18 Vict. c. 31).

Special contracts by railway company, under sect. 7, 958. CARRIERS.

- iv. Joint Stock Companies Act (19 & 20 Vict. c. 47).

Sect. 31. Bill of exchange, drawn on, and accepted by, officer of company, 499. BILLS OF EXCHANGE AND PROMISSORY NOTES, I. i.

II. Contracts by companies.

- i. By railway companies, as carriers, 958. CARRIERS.
- ii. By banking company. Transfer of shares, 887. CONTRACT, VI. vii.
- iii. Bill of exchange, drawn upon a limited company. What amounts to a "signing" by their officer, within The Joint Stock Companies Act, 1856, 499. BILLS OF EXCHANGE AND PROMISSORY NOTES, I. i.
- iv. Insurance company. Due execution of a policy by directors, but without the previous authorization required by the deed of settlement: good as against the company, 183. CONTRACT, IV.

III. Actions against companies.

- i. Against a railway company, for libel. What amounts to implied, and what (semble) to express, malice in them, 115. LIBEL, I. i.
- ii. Against a railway company for negligence, 958. CARRIERS, 719. NEGLIGENCE, I. ii.
- iii. On insurance policies. CONTRACT. INSURANCE.

COMPOSITION.

Of tithes, I. RATE, I. (1).

CONDITION PRECEDENT.

CONTRACT, VI. vi.

CONDITIONS OF SALE.

VENDOR AND VENDEE, III.

CONSIDERATION.

Failure of. CONTRACT, VI. vii.

CONSTABLES.

Appointment of, under stat. 5 & 6 Vict. c. 109.

Duty of vestry, summoned for the purpose of making out a list of persons competent to serve.

Under sects. 2 & 3 of stat. 5 & 6 Vict. c. 109, where justices issue a precept to overseers requiring them to return a list of a competent number of men in their parish to serve as constables, and the overseers accordingly summon a vestry within the fourteen days after receiving the precept, prescribed in sect. 3, the vestry has no discretion, but must make out the list.

Therefore, where such vestry, having met in obedience to the precept, had adjourned for a twelvemonth, and made no return, this Court, on motion made after the expiration of the fourteen days, issued a mandamus commanding the overseers to summon a vestry for the purpose of making out and returning a list.

Although the affidavits in support of the rule disclosed no ground for considering the appointment of the parochial constables to be necessary, and although, in opposition to the rule, it was deposed that the inhabitants considered the appointment of parochial constables to be superfluous and uselessly expensive, a paid police having been appointed under stat. 19 & 20 Vict. c. 69.

And although it was also deposed that the parochial constables of the preceding year were ready to serve on. *Regina v. Overseers of North Bierley*, 519

CONTINUANCES.

APPEAL, II. IV.

CONTRACT.

(By charter-party). SHIP, IV.

(Of insurance). INSURANCE.

(By lease). LANDLORD AND TENANT, I.

FIRST: Contracts by corporations. Their rights and liabilities.

I. Special contract by railway company, under The Railway Traffic and Canal Act. Oral evidence to explain, 958. CARRIERS.

II. By commissioners, elected annually under a local Act; rights and remedies of a clerk, appointed by them under the Act, against subsequent commissioners.

Commissioners were appointed, to be annually elected, for executing a local Act (9 G. 4, c. xxvi.). They had power to levy rates. By the Act they had power to appoint clerks and other officers, and to pay them salaries out of the money to be raised under the Act. They had power to execute many works. By the Act they might sue and be sued by their clerk; and the commissioners were exempted from personal liability for any contracts entered into by them as commissioners.

Held, that a clerk, appointed by the commissioners for one year, might maintain an action for his salary against the clerk of the commissioners in a subsequent year.

Held also, that it was within the scope of the authority of the commissioners to employ an attorney; and that he might recover in an action against the clerk of the commissioners in a succeeding year. *Hall v. Taylor*, 107

III. By a board of guardians, not under seal. What are incidental and necessary purposes.

The guardians of a poor law Union, suspecting fraud by their clerk in the Union accounts, employed plaintiff to investigate them, and, during the progress of such investigation, and after the appointment of a new clerk, also employed plaintiff to make up the Union accounts for the last half year, which involved a fresh investigation by him into the old accounts. Plaintiff was em-

ployed under three several resolutions of the Board of Guardians, entered in their minute book; but no contract was made under the seal of the board. In an action by plaintiff against the board for work and labour,

Held, by Erle, J. (dubitante Crompton, J.), that, as the work done by plaintiff was incidental and necessary to the purposes for which the Board of Guardians were created, and had been performed by plaintiff at the request of the board, he was entitled to recover, though the contract was not under seal. *Haigh v. North Bierley Union*, 873

IV. Due execution of a policy by directors of an insurance company, but without the previous authorization required by the deed of settlement: good as against the company.

The deed of settlement of a life assurance society, completely registered under stat. 7 & 8 Vict. c. 110, provided, by the 20th section of the deed, that the common seal should not be affixed to any policies except by the order of three directors, signed by them and countersigned by the manager, and, by sect. 28, that every policy should be given under the hands of not less than three of the directors and sealed with the common seal. By sect. 101, the books containing the proceedings of the general meetings and of the board of directors were to be open to the inspection of shareholders. A policy was executed, sealed with the common seal, and signed by three directors, one of whom was manager; but there was no previous order made as required by the 20th section. The company, in discussions with the assured, treated the policy as effective. Held: that they could not repudiate their liability on the policy, upon the ground that the execution was not authorized.

Two life assurance companies, P. and A., were in the habit of reassuring to each other in respect of policies granted to third persons by the reassured. By the course of business, as any premium became due from one company to the other, the company entitled to the premium gave to the company owing it a receipt for the amount: on periodical settlements of account between P. and A., the premiums due on each side were taken into account, the balance struck, and paid by the party against whom it stood. No other payments passed between P. and A. A premium being due from P. to A., A. gave P. a receipt for the amount. At this time A. was indebted to P.: the amount of the premium went into the account in the usual course of business; and, at the next settlement, a balance was due from, and paid by, A. to P. Held: that the premium was paid at the time when the receipt was given. *Prince of Wales Assurance Company v. Harding*, 183

SECONDLY: Contracts by individuals.

V. Evidence explanatory of written contract.

i. Evidence as to the class of contract.

(1). Plaintiffs sold to defendant "50 tons best palm oil, expected to arrive" "per The Chalco," "at 40l. 10s. per ton:" "wet, dirty, and inferior oil, if any, at a fair allowance." The oil, on arrival, contained one-fifth only of "best" oil. In an action for not accepting the oil:

Held, that oral evidence was admissible to show that, according to mercantile usage, the contract in question was satisfied if the oil delivered contained a substantial portion of "best" oil: and such evidence was for the jury. *Lucas v. Bristol*, 907

(2). D. M. & Co., brokers in London, being employed by one S. to purchase oil, dealt with T. & M., brokers, who were employed by plaintiff to sell oil, without either broker disclosing the names of their principals. D. M. & Co. delivered to T. & M. a note as follows: "Sold this day for Messrs. T. & M. to our principal 10 tons of oil," specifying the terms and price, which was above 10l. The note was signed D. M. & Co., brokers. Quarter per cent. brokerage to D. M. & Co. D. M. & Co. did not disclose the name of their principal S. till after the lapse of an unreasonable time, when S. had become insolvent. Plaintiff sued D. M. & Co. for not accepting the oil, laying the sale as by himself to D. M. & Co. Defendants denied the contract. On the trial, plaintiff proved a custom in the trade that, when a broker purchased without disclosing the name of his principal, he was liable to be looked to as principal.

Held, by the majority of the Court of Exchequer Chamber (Cockburn, C. J., Pollock, C. B., Williams and Crowder, J.), affirming the judgment of the Queen's Bench, that evidence of the custom was admissible, as not contradicting the written instrument, but explaining its terms; or adding a tacitly implied incident; and that the note thus explained was a sufficient memorandum of the contract sued upon to satisfy the Statute of Frauds; and that the action lay.

Dissentientibus Willes, J., and Martin and Channell, Bs. *Dale v. Hunsfrey*, 1004

ii. Evidence as to the particular contract.

Of the meaning of "not insured" in a special contract by a railway company, under sect. 7 of the Railway Traffic and Canal Act, 1858. CARRIERS.

VI. Contracts void and voidable, when and when not.

i. By performance becoming impossible.

Promise to marry, not avoided by defendant, before breach, becoming afflicted with a disease rendering it dangerous for him to marry.

Action for breach of promise of marriage,

averring the promise to be to marry within a reasonable time.

Plea, that defendant, after the promise and before the breach, became afflicted with disease occasioning bleeding from the lungs, and by reason of such disease became incapable of marriage without great danger to his life, and therefore unfit for the married state, of which plaintiff before action had notice. Issue thereon. The jury found all the averments of this plea in favour of the defendant, except the averment of notice, which they negatived.

Held, in the Queen's Bench, by Lord Campbell, C. J., and Crompton, J., that the plea was not sufficient, at all events without this averment.

Held by Wightman, J., and Erle, J., that it was sufficient.

The junior Judge having withdrawn his opinion, and a rule to enter the verdict on this plea for the plaintiff having been discharged :

Held, in the Exchequer Chamber, on appeal, that the plea was no answer to the action. Per Williams, J., Martin B., Crowder, J., and Willes, J. Dissentientibus Pollock, C. B., Bramwell, B., and Watson, B. *Hall v. Wright*, 746

ii. By bankruptcy.

Assignment of life policies as security, and covenant to pay the premiums: does not constitute a liability to pay money upon a contingency within sect. 178 of stat. 12 & 13 Vict. c. 106, 914. **BANKRUPT LAW CONSOLIDATION ACT.**

iii. Under the Statute of Frauds. **STATUTE OF FRAUDS.**

iv. On the ground of champerty or maintenance.

Assignment to attorney, by client, of the subject-matter of a suit, as security for costs: not void.

W. having recovered a verdict in ejectment, executed an indenture, on the day following, reciting that he was indebted to the attorney who had conducted the suit in 100*l.* for money lent and for work as an attorney, and was unable then to pay it, and had agreed to secure, as after mentioned; and he granted and assigned to the attorney the crop of potatoes then growing upon the close which was the subject of the action, and all other effects then thereon, with power to the attorney to enter upon the close, and inspect, until payment of the 100*l.* and interest; proviso that, if W. should pay the 100*l.* and interest by a day named, the indenture should be void; covenant by W. to pay the 100*l.*, and the interest, meanwhile; power to the attorney, in case of default of payment, to enter and carry away the effects assigned, or otherwise to remain on the premises for the purpose of disposing of the ef-

fects, and converting them into money; proviso, that, till default, W. should remain in possession, add that, if the attorney sold the property, he should hold the surplus, after paying the expenses and reimbursing himself, in trust for W.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that this indenture could not be impeached, either on the ground of its amounting to champerty or maintenance, or as being contrary to public policy.

Default was made in the payment: and, on the day following the day named for the payment, judgment was signed in the ejectment. Afterwards judgment was recovered against W. in an action by B., in a *fi. fa.* issued: after that, a *habere facias* issued in the ejectment; after that the sheriff seized the property under the *fi. fa.* in the action of B. against W.; after that, possession under the *habere facias* was delivered to W., and by W. to the attorney; and the attorney gave notice of his title to the sheriff; afterwards the sheriff under the *fi. fa.* sold the crop of potatoes, and W.'s interest in the close. The attorney brought an action against the sheriff; after the commencement of which the sheriff's vendee gathered the potatoes, and disposed of them to his own use.

Held, by the Court of Queen's Bench, that the action lay; the sheriff having, after possession had been given to the attorney, authorized the conversion of the potatoes.

Judgment affirmed in the Exchequer Chamber, on the ground that, at any rate, the attorney's possession related back to the accruing of his title, which was prior to the first seizure by the sheriff. *Anderson v. Radcliffe*, 806

v. on the ground of fraud.

- (1). Promise to marry, not voided by an agreement by plaintiff, before such promise, to marry another, such promise not having been fraudulently withheld from defendant.

Declaration by a woman on an agreement between herself and defendant to marry one another within a time elapsed before the suit; averment that a reasonable time had elapsed before the suit, and plaintiff had always been ready and willing to marry defendant; but defendant had refused.

Plea: that, before and at the time of the agreement, plaintiff and Y. had agreed to marry one another, which agreement was in full force, as plaintiff knew, but of which defendant was then ignorant; and that, though plaintiff ought fully to have disclosed the same to defendant before the making of the agreement, and though defendant would not have made the agreement had the same been disclosed to him before the making thereof, plaintiff, at the time of the agree-

ment, withheld and concealed the same from defendant, and defendant made the agreement whilst he was wholly ignorant of the same.

On demurrer: held a bad plea; there being no express allegation of fraud. *Beachey v. Brown*, 796

- (2). When the power to rescind on the ground of fraud ceases. What is then the remedy.

A person induced by fraud to enter into a contract under which he pays money may, at his option, rescind the contract and recover back the price, as money had and received, if he can return what he has received under it. But, when he can no longer place the parties in statu quo, as if he has become unable to return what he has received in the same plight as that in which he received it, the right to rescind no longer exists; and his remedy must be by an action for deceit, and not for money had and received. *Clarke v. Dickson*, 148

vi. Non-performance of a condition precedent.

Insurance for a year on the life of another; quarterly instalments of premium. Payment quarterly not a condition precedent to the continuance of the policy for the year, 156. *INSURANCE*, I. i. (1).

vii. Failure of consideration.

Money had and received does not lie, by transferee of shares to recover back purchase-money paid by him with full knowledge of the facts.

Defendant being possessed of shares in a joint stock banking company, instructed his broker to sell them. Plaintiff instructed his broker to purchase shares in the said company. The two brokers agreed with each other to sell and buy respectively. Both brokers were members of the Stock Exchange; and, according to the custom of the Stock Exchange, the names of the principals are not mentioned at the time of such contract, but are communicated on the day preceding the day on which the sale is made; and, on the day last mentioned, the parties executed the contract. By the rules of the company, transfers could not be made without the consent of the directors; and seven days' notice of transfer must be given to them: but in practice, the rules of the company in this respect were not strictly enforced. In this case, no notice was given. On the day for which the sale was made, defendant's broker obtained a blank form of transfer from the company, which defendant executed three days afterwards. On the following day defendant's broker delivered the transfer to the plaintiff's broker. On that day the company had stopped payment: and plaintiff's broker refused to accept the transfer, or to pay the purchase-money. The company never consented to the transfer, nor

resumed business, and ultimately became bankrupt.

Plaintiff desired his broker not to pay for the shares; but the broker, in obedience to the decision of the Committee of the Stock Exchange, before whom the question had been brought, paid the purchase-money to defendant's broker, who paid it over to defendant. Afterwards plaintiff paid the sum to his own broker, who had threatened to enforce payment by proceedings at law.

Plaintiff having sued defendant for money had and received, on the ground of failure of consideration: Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the action did not lie. *Remfry v. Butler*, 887

VII. Measure of damages for breach of. DAMAGES. See, also, *PRINCIPAL AND AGENT. VENDOR AND VENDEE.*

[VIII. Waiver of breaches of. See *LANDLORD AND TENANT*, I. (3).]

CONVICTION.

In a colonial court, of a criminal offence. A writ of error, or certiorari, to quash, will not be granted without the Attorney-Generals' fiat, 828. *ERROR.*

CORPORATION.

I. Contracts by. *CONTRACT.*

II. Action against.

For malicious libel. What amounts to implied, and (seemle) what to express, malice, 115. *LIBEL* I. (1).

COSTS.

I. Right to.

Costs on affirmation, by Exchequer Chamber, of the judgment of the court below, 1069.

II. Security for.

On appeal from county court, under stat. 13 & 14 Vict. c. 61, s. 14, within what time to be given.

Stat. 13 & 14 Vict. c. 61, s. 14, giving an appeal from the county court, makes it a condition precedent that security for costs should be given within ten days after the determination complained of. *Stowe v. Deno*, 504

III. Taxation of.

i. In Superior Courts.

(1.) What are interlocutory costs, within Reg. Gen. Hil. 16 Vict. c. 63.

A defendant taken under a ca. sa. was, on summons, discharged by order of a Judge, with costs, he bringing no action. Held, that those costs were interlocutory costs within the meaning of Reg. Gen. Hil. 16 Vict. c. 63. *Melville v. Leeson*, 324

(2). Verdict for defendant. Recovery from plaintiff, by witness attending on plaintiff's subpoena, of expenses paid to witness by defendant, but repaid, pursuant to agreement, on their being disallowed on taxation, at plaintiff's instance, 575. *WIRNESS, I.*

(3). Actions by attorney on two separate bills of costs: consolidation.

Plaintiff, an attorney, delivered a bill for business done for defendant; and afterwards delivered another bill for other business done for defendant. Afterwards, at the expiration of a month from the delivery of the first bill, but before the expiration of a month from the delivery of the second, he proposed to defendant that the latter should waive the objection to the non-expiration of the month from the delivery of the second bill, and accept process in an action on the two. Defendant not having consented, plaintiff brought an action on the first bill, and afterwards, and after the expiration of the month from the delivery of the second bill, brought an action on that. Defendant afterwards obtained an order for taxing the two bills. The Master taxed less than one-sixth off the first bill; but he taxed off the second bill, more than a sixth of the aggregate of the two bills: and he allowed the plaintiff the costs of the first taxation, and the defendant the costs of the second taxation; making two separate allocaturs.

The Court (dissentiente Erle, J.), on the application of the defendant, ordered the Master to review his taxation of the costs of the taxations, and to include the whole in one allocatur; and that the two actions should be consolidated. *Beardall v. Cheekam,* 243

(4). Action brought in Q. B., sent to county court by order of a Judge: scale of taxation of costs, 737. *COUNTY COURT, I. (1).*

ii. In county courts.

Taxation by registrar, under stat. 19 & 20 Vict. c. 108. No appeal lies to Q. B., 123. *COUNTY COURT, I. (2).*

COUNTY COURT.

I. Costs in.

(1). Action brought in Q. B., sent to county court by order of a Judge: scale of taxation of costs.

Under sect. 26 of stat. 19 & 20 Vict. c. 108, a Judge of Q. B. ordered that the trial in an action brought in Q. B. should be had in a county court. No application was made to him to impose any terms. The action having been tried, the costs were taxed by the Master in Q. B. according to the scale of the Superior Courts, so far as regarded the proceedings in Q. B., but, so far as regarded the proceedings in the county court, according to the county court scale.

On motion to review his taxation: Held that he was justified in so far adopting the county court scale as his guide. *Wheatcroft v. Foster,* 737

(2). Taxation by registrar, under stat. 19 & 20 Vict. c. 108, s. 34. No appeal to Q. B.

No appeal lies, under stat. 13 & 14 Vict. c. 61, s. 14, to this Court from the decision of a county court on an interlocutory matter, such as the taxation of costs under stat. 19 & 20 Vict. c. 108, s. 34. An appeal on such a matter having been brought, this Court refused to hear the point argued, on the ground that they had no jurisdiction to decide such a point, but entertained the appeal so far as to dismiss it with costs. *Carr v. Stringer,* 123

II. Appeal from.

Under stat. 13 & 14 Vict. c. 61, s. 14. Security for costs, within what time to be given, 504. *COSTS, II.*

CURATE.

Salary of: when to be deducted from the gross annual value of a tithe commutation rent-charge, in calculating the net annual value, 1. *RATE, I. (1).*

CUSTOMS CLAUSES CONSOLIDATION ACT, 1853.

(16 & 17 Vict. c. 107).

Sects. 170, 171, 172. Stowage of cargo: certificate: penalty for neglect. When such neglect by the master vitiates the insurance on the cargo by another party, 670. *INSURANCE, II. (2).*

DAMAGES.

Measure of.

I. Assignment to trustees, for the benefit of creditors, of "all writings," &c. Trover by trustees against executrix of assignor, for a policy on his life. Measure of damages, 75. *ASSIGNMENT, I.*

II. Sale on a warranty. Action by vendee, having resold on a similar warranty, against vendor, for breach of warranty. Measure of damages.

Declaration charged that defendant had sold to plaintiff seed barley, warranting it to be of a particular quality, but had delivered seed barley of an inferior quality: and it alleged, as special damage, that plaintiff, relying on the warranty, had sold the seed barley with a similar warranty to T., who had sown it and had thereby obtained a crop inferior to that which would have been produced by seed barley of the quality warranted, and so incurred damages which the plaintiff was liable to make good.

Defendant having suffered judgment by default, it was proved, on the execution of

the writ of inquiry for damages, that the sale by plaintiff had taken place as alleged; and evidence was given of the pecuniary amount of the values of the crop obtained and the crop which would have been produced by seed barley of the quality warranted. It further appeared that the plaintiff's vendee had claimed from him compensation, which the plaintiff had agreed to make; but no sum had been agreed upon, and no payment actually made.

Held that, in assessing the damages, the jury ought to include the amount to which they considered the plaintiff had become liable to his vendee in respect of the difference of the crops. *Wightman, J., dubitante. Randall v. Raper,* 84

III. Assessment of damages for breach of condition in a bond not to practise as a surgeon within certain limits.

Declaration on a bond for 300*l.* given by defendant to plaintiff. The declaration set out the condition, which recited that defendant and B. had practised in partnership the professions of surgeons, apothecaries, accoucheurs, and general medical practitioners at W., and were about to dissolve partnership; and that it had been agreed to dispose of their practice at W. to plaintiff for 150*l.*: and defendant and B. had agreed with plaintiff to enter into the bond, conditioned as therein mentioned, for the security of plaintiff against any risk of defendant or B. practising or introducing any other practitioner within the distances therein mentioned. And it was declared that, if either defendant or B. should within three years practise, or attempt to practise, the professions of surgeon, apothecary, accoucheur, or general medical practitioner, or either of them, or carry on the business of chemist or druggist, within one mile from the parish church of W., or prescribe for any patient of plaintiff, or attempt to induce such patient to call in defendant, B. or any other medical practitioner than plaintiff, or induce any other medical practitioner to practise within one mile, &c., or introduce any one who should so practise as surgeon, &c., within such distance to any patient of plaintiff, or if defendant or B. should, within ten years, carry on the business of chemist or druggist, or open a surgery, or place for dispensing medicine, or be connected with any one opening, &c., within one mile, &c., or if B. should underlet or assign his dwelling-house at W. to any physician, surgeon, &c., or suffer any person practising, &c., to reside there before 13th February then next, "then, and in any or either of the said cases, if the defendant or the said" B., their executors, &c., "or either of them, did and should forthwith well and truly pay unto the plaintiff the sum of 300*l.*, the said bond

should be void." There was no express stipulation that the bond should be void if the defendant and B. abstained from doing the acts, nor that the bond should in any case stand good. Breaches were assigned: and the jury found that the defendant had practised within the mile, and had not paid any part of the 300*l.*; and they assessed the damages in respect of this breach at 25*l.*

Held: that plaintiff was entitled to recover the whole sum of 300*l.* *Mercer v. Irving,* 563

DEBT.

I. "Claim" "for a debt," under sect. 25 of The Common Law Procedure Act, 1852, comprehends debt upon a judgment: particulars may be ordered on the writ, and judgment signed for non-appearance, under sect. 27, 884. COMMON LAW PROCEDURE ACTS, I. i.

II. What is a "debt" which can be attached under the garnishee clauses (sects. 60, 67), of The Common Law Procedure Act, 1854, 63. COMMON LAW PROCEDURE ACTS, II. i.

DECEIT.

Action for, 148. CONTRACT, VI. v. (2).

DECLARATION.

PLEADING, II.

DEED.

Execution of.

Due execution of a policy by directors of an insurance company, but without the previous authorization required by the deed of settlement: Good as against the company, 183. CONTRACT, IV. See also ASSIGNMENT, BOND, INSURANCE.

DELIVERY ORDER.

VENDOR AND VENDEE, II.

DEMURRAGE.

SHIP, IV.

DEPOSITIONS.

Application for, to clerk of justices, under stat. 11 & 12 Vict. c. 31, s. 9: within what time to be made, 253. MANDAMUS, II.

DEPOSIT MONEY.

VENDOR AND VENDEE, III.

DEVISE.

Construction of words of limitation, "For default of such issue."

B. had one brother C., and two sisters M. and A.; and C. had three sons, J., C., and T. In this state of the family, R., by will made in 1768, devised land of which he was

seised in fee simple to his brother C. for life, remainder to trustees to preserve contingent remainders, remainder to J. for life, remainder to trustees to preserve contingent remainders, remainder to the first son of the body of J., and the heirs male of the body of such first son lawfully issuing; "and, for default of such issue," to the second, third, fourth, fifth, sixth, seventh, and all and every son and sons of the body of J., severally and successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, and of the several and successive heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons, and the heirs male of his body, being always preferred and to take before the younger of such son and sons, and the heirs male of his body; "and, for default of such issue," similar limitations to R.'s brother's son C., and to his sons in tail male; "and, for default of such issue," similar limitations to T., and to his sons in tail male; "and, for default of such issue," to the fourth, fifth, &c., and all and every, son and sons of the body of R.'s brother C., lawfully to be begotten, successively, in tail male; "and, for default of such issue," to all and every the daughter and daughters of R.'s brother C., and her and their heirs for ever, to take as tenants in common (if more than one), and not as joint tenants; "and, for default of such issue," similar limitations to the daughters of J.; "and, for default of such issue," similar limitations to the daughters of R.'s brother's son C.; "and, for default of such issue," similar limitations to the daughters of T.; "and, for default of such issue," similar limitations to all and every the daughter and daughters lawfully to be begotten by the fourth, fifth, &c., sons of R.'s brother C., the daughters of the elder of such after born sons of the brother to take and be preferred before the daughters of the younger; "and, for default of such issue," to R.'s sisters M. and A., and their heirs for ever, as tenants in common, and not as joint tenants. In a later part of the will was contained a shifting clause, providing that, if any of the nephews J. C., or T., or any after born son of R.'s brother C., should enter into religion and become a professed priest of any order of the church of Rome, or if any of the daughters of R.'s brother C., or of the nephews J. C., and T., or of any after born son of R.'s brother C., should enter into religion and become a professed nun, immediately thereupon, the uses limited as to such nephew or after begotten son as should so enter into religion, &c., or of such daughter who should so enter into such religion, &c., "shall cease, determine, and be absolutely null and void to intents and purposes whatsoever:

and that the person or persons next in reversion to take, according to my afore-mentioned limitation, shall immediately thereupon enter into and upon my said manors." &c., "and hold and enjoy the same in as full a manner, to all intents and purposes whatsoever, as he, she, or they would have been entitled to have held, and enjoyed the same in case the person or persons so entering into religion as aforesaid had been then dead, without issue of his, her, or their body or bodies as aforesaid."

Held, by the Court of Exch. Ch., affirming the judgment of the Court of Q. B., that the limitations to the daughters gave interests, not in fee simple, but in fee tail general; for that the words "for default of such issue," following the limitations to the daughters, must be understood as meaning "for default of such issue of the body of the daughter."

Seemle, by the Court of Exch. Ch. (dissentiente Martin, B.), and by the Court of Q. B., that, but for the occurrence of the shifting clause, the previous limitations would have been construed as giving interests in fee simple to the daughters. *Biddulph v. Lees*, 289
See also EXECUTOR.

DIRECTORS.

COMPANY.

DISORDERLY HOUSE.

Penalty on shopkeeper, under a local Act, for permitting disorderly conduct, or prostitutes to assemble, in the shop. Magistrate when, and when not, bound to convict of the latter offence.

By a local police Act (5 & 6 Vict. c. cvi., for Liverpool), a penalty is imposed, recoverable before a justice, on any person keeping a shop where refreshment is sold, not being a licensed victualler or licensed to sell beer by retail to be drunk on the premises, if he knowingly permit disorderly conduct in such shop, or knowingly suffer prostitutes to meet together and remain therein.

Held that, if the justice infers, from prostitutes coming together to such shop, that they have in fact met for purposes of prostitution or other disorderly conduct, he should, whether there has been actual disorderly conduct or not, convict the owner of the shop who has knowingly permitted this: but not otherwise.

Therefore, where, on appeal and case stated, it appeared that it had been proved before a justice that an owner of such shop had knowingly permitted prostitutes to meet and remain there, that refreshments were there sold, and that no disorderly conduct had been proved to have taken place there, and the justice had refused to convict, the

court dismissed the appeal against his decision. *Greig v. Bendeno*, 133

DISTRESS.

LANDLORD AND TENANT, II.

DOCTORS' COMMONS.

College of. Mandamus does not lie to the visitors, commanding them to inquire into the proceedings of the College under stat. 20 & 21 Vict. c. 77, ss. 116, 117.

This Court refused to grant a mandamus requiring the visitors named in the charter of the College of Doctors' Commons to inquire into the mode in which the College, under stat. 20 & 21 Vict. c. 77, ss. 116, 117, had exercised their discretion as to the surrender of their charter and the disposition of their property. *Dr. Lee's Case*, 863

DUES.

Ecclesiastical; and tenths: to be deducted from gross annual value of a tithe commutation rent-charge, in calculating the net annual value. I. RATE, I. i.

EASEMENT.

Reserved to landlord, of the exclusive use of a sewer. Action by him against tenant for interruption. Construction of lease, 512. LANDLORD AND TENANT, I. i.

EJECTMENT.

Jointer of tenants in common, under Common Law Procedure Act, 1852. COMMON LAW PROCEDURE ACTS, I. iii.

ERROR.

Writ of: will not be granted to bring up the record of a conviction, in a colonial court, for a criminal offence, without the Attorney-General's fiat.

Where, upon an indictment in a colonial court proceeding by course of common law, the prisoner has been convicted of a criminal offence, and is in execution of the sentence, the Court of Queen's Bench will not grant a writ of error to bring up the record of the conviction unless the Attorney-General has issued his fiat for a writ of error.

Nor will the Court, without such fiat, direct a certiorari to issue for the purpose of bringing up the record, and bringing a writ of error upon it.

A writ of habeas corpus is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of the common law. *Ex parte Lees*, 828

[II. Right of administrator d. b. n. to bring error. See *Executors*, I. ii.]

EVIDENCE.

I. Competency of witnesses.

Under Evidence Amendment Act (14 & 15 Vict. c. 99), s. 3.

Information, before justices, under stat. 1 & 2 W. 4, c. 32, for poaching. Party charged not competent or compellable to give evidence for or against himself.

An information before justices, under stat. 1 & 2 W. 4, c. 32, s. 23, for using an engine for the purpose of taking game, without the authority of a certificate, is a criminal proceeding in which the party is charged with the commission of an offence punishable on summary conviction, within the meaning of sect. 3 of stat. 14 & 15 Vict. c. 99; and, therefore, the party charged is not competent or compellable to give evidence for or against himself. *Cattell v. Ireson*, 91

II. Admissibility of evidence.

i. To explain a written instrument.

(1). Of oral evidence, explanatory of the record of an action, as showing in respect of which count the damages (entered generally on all) were given.

In an action between A. and B., it became a question whether damages had been recovered in a previous action against A. by a third party in respect of certain acts. A., to prove the affirmative, produced the record in the previous action, which showed counts on different causes of action, one count only being on the acts now in question. The damages were entered on all the counts, and damages entered generally on all. Evidence was then received that the damages had in fact been given for the matters in the one count only. Held, that such evidence was receivable, as explaining the former record, and not contradicting it.

Although, according to the evidence, it appeared that in the previous action the verdict on one of the other counts ought to have been for the then defendant. *Preston v. Peeke*, 336

(2). Of parol evidence, explanatory of a special contract by a railway company, under the Railway Traffic and Canal Act, 1858. CARRIERS.

(3). Of usage of trade, explanatory of a written contract, 907, 1004. CONTRACT, V. i. (1), (2).

ii. In libel and slander.

Of statements made by defendant subsequently to such libel or slander.

Under sect. 61 of the Common Law Procedure Act, 1852, and forms 32, 33, in Schedule (B.) to that Act, the declaration in an action for libel or slander need not state any colloquium, but may set out the words complained of, and put any construction upon them by innuendo.

Whether the words were spoken with such meaning is for the jury.

When the libel or slander is, *prima facie*, a privileged communication, it is open to the plaintiff to put in evidence statements made by the defendant subsequently to the libel, as tending to show malice in the defendant at the time of publication of such libel. The Judge ought, especially if there be a considerable interval between such statements and the publication, to direct the jury to consider whether such subsequent statements might not refer to something which happened subsequently to the libel, so as not to show malice in the defendant at the time of the publication of the libel charged. *Hemmings v. Gasson*, 346

III. Evidence in particular cases.

- (1). Of birth settlement, 231. Poor, I. i. (1).
- (2). Of settlement by apprenticeship, under an indenture, 678. Poor, I. i. (2).
- (3). Of infringement of a patent, 529. PATENT.
- (4). Of implied, and express, malice in a corporation aggregate, sued for libel, 115. LIBEL, I. (1).

EXECUTOR AND ADMINISTRATOR.

I. Rights of.

- (1). Action by husband, administrator of wife, for negligence causing her death: form of declaration.

Plaintiff, as administrator to his deceased wife, declared that defendant was in occupation of a brewery and office, and a passage leading thereto from the public street, used by defendant for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street: yet defendant wrongfully and negligently permitted a trap-door in the floor of the passage to be and remain open without being properly guarded and lighted; and the wife, who had been to the office as a customer of defendant, and otherwise in defendant's business, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being and remaining open and not properly guarded and lighted; whereby she was killed.

On demurrer to the declaration, held:

1. That the plaintiff's right to sue as administrator, under stat. 9 & 10 Vict. c. 93, sufficiently appeared, without express allegation of pecuniary damage.

2. That the duty of defendant, and breach, sufficiently appeared. *Chapman v. Rothwell*, 168

[(2.) Right of administrator d. b. n. to bring error on a former judgment.

An administrator de bonis non has a right

to bring error on a judgment obtained against a prior administrator of the intestate, and he may commence his proceeding by taking out a writ of scire facias ad audiendum errores in the court in which the judgment has been recovered. *Curlew v. The Earl of Mornington*, 1106]

II. Liability of.

- (1). Assignment to trustees, for benefit of creditors, of personal estate, and "all writings," &c. Trover by trustees against executrix of assignor, for a policy on his life: measure of damages, 75. ASSIGNMENT, I.

- (2). Bonâ fide payment and delivery to a feme covert, appointed co-executrix, but whose husband never assented to her acting, and to whom probate has consequently been refused: when good as a defence to an action by the co-executor.

Payment by a debtor of a testator, and delivery by a bailee of chattels bailed by the testator, to a feme covert who is appointed executrix, are valid as against her co-executor, though the husband of the executrix never assented to his wife acting as executrix, and subsequently to the payment, refused to allow her to act, and although on that ground probate was refused to her, if the payment and delivery were made bonâ fide at the request of the executrix as such, without knowledge, by the party paying and delivering, of the dissent of the husband, though with knowledge that she was a feme covert. So held by the majority of the Exchequer Chamber, affirming the judgment of the Queen's Bench; Cockburn, C. J., and Bramwell, B., dissenting. *Pemberton v. Chapman*, 1056

FELON.

Disposal of his chattels upon conviction.

A Judge has no power, either by statute or at common law, to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor. *Regina v. Corporation of London*, 509

FEME SOLE. FEME COVERT.

HUSBAND AND WIFE.

FISHING.

Breadth of meshes of net, under stat. 1 Eliz. c. 17, s. 3.

Stat. 1 Eliz. c. 17, s. 3, prohibits fishing except with a net "whereof every mesh or mask shall be two inches and a half broad."

Held that the breadth of two inches and a half is to be measured by the length of thread between the adjacent knots.

So decided, on a case arising under a local Act (45 G. 3, c. 33, for Carmarthenshire).

which by reference to stat. 1 Eliz. c. 17, contained the same prohibition. *Thomas v. Evans*, 171

FRAUD.

CONTRACT, VI. v.

FRAUDS.

Statute of. STATUTE OF FRAUDS.

GARNISHEE.

Under Common Law Procedure Act, 1854.
COMMON LAW PROCEDURE ACTS, II. i.

GENERAL RATE.

Under Metropolis Local Management Act.
METROPOLIS LOCAL MANAGEMENT ACT, III.

HABEAS CORPUS.

Not grantable, in general, on behalf of a party in execution on a criminal charge, after judgment, on an indictment according to the course of the criminal law, 828. *ERROR*.

HIGHWAY.

I. Repair of under Highway Act. *HIGHWAY ACT, I.*

II. Common law liability to repair, *ratione clausuræ*, in whom, and in what cases.

The liability to repair a highway *ratione clausuræ* is in the occupier of the lands enclosed; not in the owner, as owner.

Per Erle, J., such liability does not accrue where either the highway is not immemorial, or where the adjoining land enclosed has not, before the enclosure, been used for passage. *Regina v. Ramaden*, 949

HIGHWAY ACT.

(5 & 6 W. 4, c. 50).

I. Sect. 23. Order of special sessions as to utility of highway. Appeal lies to Quarter Sessions, by parties dedicating.

Under stat. 5 & 6 W. 4, c. 50, s. 23, a special sessions was held, after the vestry had deemed a highway not to be of sufficient utility to justify its being kept in repair at the expense of the parish. The justices made an order deciding, in conformity with the determination of the vestry, that the highway was not of sufficient utility.

Held, that an appeal to the Quarter Sessions lay, by the persons dedicating the highway, against this order. *Regina v. Justices of Derbyshire*, 69

II. Sect. 44. Surveyor, when liable to a penalty for not laying his accounts before the justices.

Under The Highway Act, 5 & 6 W. 4, c. 50, an assistant surveyor to a highway board, appointed in pursuance of sect. 18, is not

liable to a penalty, under sect. 44, for not making out his accounts and laying them before the justices at the special highway sessions; sect. 44 applying only to an ordinary surveyor of highways, where no board and assistant surveyor to the board has been appointed. *Adams v. Lakeman*, 615

HUSBAND AND WIFE.

I. *Bonâ fide* payment and delivery to a *feme covert*, appointed co-executrix, but whose husband never assented to her acting, and to whom probate has consequently been refused: when good as a defence to an action by co-executor, 1056. *EXECUTOR, II. (2).*

II. Action by husband, administrator of wife, for negligence causing her death. Proper form of declaration, 168. *EXECUTOR, I.*

IMPOUNDING.

LANDLORD AND TENANT, II.

INCLOSURE.

Liability to repair a highway *ratione clausuræ*, in whom, and in what cases, 949. *HIGHWAY, II.*

INFANT.

An action does not lie, on behalf of an infant of tender years, for injury caused by the joint negligence of defendant and the party who had the charge of the infant. 719. *NEGLIGENCE, I. ii.*

INFORMATION.

For penalties, required by statute to be recovered within a given time. Refusal by justices to hear: *mandamus*: return that, since the writ, they had heard, and dismissed as too late: *demurrer*, 474. *MANDAMUS, IV.*

INFRINGEMENT.

Of patent. *PATENT.*

INSURANCE.

I. On lives.

i. Payment of premiums.

(1). Insurance, for a year, on the life of another; quarterly instalments of premium. Payment quarterly not a condition precedent to the continuance of the policy for one year.

Plaintiff effected a policy of assurance with defendant, dated 2d August, 1836, on the life of B. The policy recited that plaintiff had paid to defendant 8*l.* 5*s.* as the premium for the assurance to 2d November, 1856; and it witnessed that, if B. should die before the termination of twelve calendar months from the date, or should live beyond such period, and plaintiff should, on or before that period, or on or before the expi-

ration of every succeeding twelve calendar months, provided B. be still living, pay the annual amount of premium, then defendant should be liable to pay 1000*l.*: provided that, if B. died before the whole of the said quarterly payments should have become payable under these presents for the year in which he should so die, it should be lawful for the defendant to deduct and retain from the said 1000*l.* so much as would be sufficient to pay and satisfy the whole of the said premiums for that year, reckoning the year to commence from 2d August.

B. died within twelve calendar months from the date; and, at the time of his death, the third quarterly instalment of 8*l.* 5*s.* was due and unpaid.

Held by the Court of Exchequer Chamber (dubitante Willes, J.), reversing the judgment of the Court of Q. B., that the defendant was liable to pay the 1000*l.*, the policy being from year to year, not from quarter to quarter; and the payment of the instalments at the quarters not being a condition precedent to the continuance of the policy for the current year. *Sheridan v. Phoenix Life Insurance Company*, 156

[The judgment of the Exchequer Chamber was reversed, in the House of Lords, on 13th August, 1860.]

(2). Mutual crediting of premiums between two companies reassuring with each other: subsequent settlement of balance. At what date such premiums to be considered as paid, 183. CONTRACT, IV.

ii. Assignment of policy.

(1). Assignment to trustees, for the benefit of creditors, of personal estate, and "all writings," &c. Trover by trustees against executrix of assignor, for a policy on his life: measure of damages, 75. ASSIGNMENT, I.

(2). Assignment of life policies as a security: covenant to pay the premiums: does not constitute a liability to pay money upon a contingency within sect. 178 of stat. 12 & 13 Vict. c. 106, 914. BANKRUPT LAW CONSOLIDATION ACT.

II. Marine.

(1). Action on time policy, for total loss. Misconduct of defendant, indirectly causing the loss, not a defence.

Action on a time policy on a ship for a total loss. Plea: that the plaintiffs knowingly, wilfully, and improperly sent the ship to sea in a condition in which it was dangerous to go to sea, and suffered her to remain in that state near the shore, during which time, by reason of the premises, the loss occurred. Issue thereon.

On the trial, it appeared that the plaintiffs personally sent the ship out to sea in an unseaworthy state, and caused her to an-

chor in the offing in that state. Whilst there she was caught in a storm from seaward and driven ashore. There was evidence justifying the jury in finding that the immediate cause of the loss was not occasioned in any way by the unseaworthiness; and, the jury having found that such was the fact, a verdict was entered for plaintiffs. There was evidence from which the jury might have drawn the conclusion that, though the unseaworthiness was not the immediate cause of the loss, the loss would not have occurred if the ship had been seaworthy when she went to sea. No question as to this was left to the jury.

The Court of Queen's Bench having made absolute a rule for a new trial on the ground of misdirection, holding that the plea was proved, if that misconduct of the plaintiff occasioned the loss, though it was not the immediate cause, the Court of Exchequer Chamber on appeal reversed the decision. Williams, J., Martin, B., Willes, J., and Bramwell, B., holding that the act of the plaintiff in knowingly sending the ship to sea could only affect the liability of the defendant if it was the immediate cause of the loss. Cockburn, C. J., concurring with the majority only on the ground of the special terms of the plea in this case. Crowder, J., dissentiente. *Thompson v. Hopper*, 1039

(2). Infringement, by master of a ship, of the provisions in the Customs Clauses Consolidation Act, 1853, as to stowage of cargo. When such infringement vitiates an insurance on the cargo by another party.

The Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107), enacts (sects. 170, 171, 172) that before any clearing officer permits a ship wholly or partly laden with timber to clear out from any British port in North America or Honduras, after 1st September or before 1st May, he shall ascertain that the whole cargo is below deck, and give the master a certificate to that effect; and the master shall not sail without such certificate, and shall not allow any part of the cargo to be upon deck (except in specified cases of necessity); and, if the master sail without the certificate, or load in the mode forbidden, he shall forfeit 100*l.*

Held that, where a master sails without such certificate, or loads in the mode prohibited, an insurance on the cargo is not thereby vitiated, unless the insured be, at the time of effecting the insurance, privy to the act of the master. *Cunard v. Hyde*, 670

III. Insurance by carriers.

Insurance by a railway company, as carriers. Evidence explanatory of "not insured," in a special contract by them under the Railway Traffic and Canal Act. 258. CARRIERS.

JOINT STOCK COMPANY.
COMPANY.

JOINT STOCK COMPANIES ACT, 1856.

(19 & 20 Vict. c. 47).

BILLS OF EXCHANGE AND PROMISSORY NOTES,
I. I.

JUDGMENT.

- I. Judgment-debtor. What is a "debt" of his which can be attached under the garnishee clauses (ss. 60, 67) of the Common Law Procedure Act, 1854, 63. COMMON LAW PROCEDURE ACTS, II. i.
- II. Action on a judgment. Particulars may be endorsed on writ of summons, and judgment signed on non-appearance, 884. COMMON LAW PROCEDURE ACTS, I. i.

JURISDICTION.

I. Of the superior Courts.

- i. To issue mandamus. MANDAMUS.
- ii. To entertain appeals.

No appeal to Q. B. from taxation of costs by registrar of county court. But Q. B. will entertain so far as to dismiss with costs, 123. COUNTY COURT, I. (2).

II. Of county courts.

Taxation of costs by registrar, under stat. 19 & 20 Vict. c. 108, s. 34. No appeal to Q. B., 123. COUNTY COURT, I. (2).

III. Of Quarter Sessions.

- (1). Magistrates cannot determine an appeal, where they are interested.

Where an appeal is determined, at Quarter Sessions, by magistrates some of whom are interested in the matter, the proceeding is null; and the proper course is to quash it on certiorari. *Re Hopkins*, 100

- (2). Appeal lies to Quarter Sessions, from the decision of petty sessions, as to the utility of a highway, by the parties dedicating, 69. HIGHWAY ACT, I.

- (3). Confirmation, at Quarter Sessions, of appeal against a poor-rate. Sessions; having determined the value and amount, not bound to determine the particular portion, of appellant's land within the parish, 481. RATE, I. (3).

IV. Of justices.

- (1). As to deciding what is a disorderly house, under a local act (5 & 6 Vict. c. cvi.), 133. DISORDERLY HOUSE.
- (2). To make order of adjudication and maintenance of a lunatic pauper. Recital of a previous order: to what extent it must show jurisdiction, 231. POOR, I. i. (1).
- (3). To award satisfaction to the owner of goods pawned, injured on the pawnbroker's premises, 469. PAWNBROKER.

- (4). To dismiss, as too late (having refused to hear within proper time), an information for penalties required by statute to be recovered within a certain time, 474. MANDAMUS, IV.

- (5). On a summons for non-payment of a church-rate, where the validity of the rate is disputed, under stat. 53 G. 3, c. 127, s. 7.

Under the proviso in sect. 7 of stat. 53 G. 3, c. 127, if a party, summoned before justices for non-payment of a church-rate, gives notice that he disputes the validity of the rate, and the justices nevertheless proceed, alleging that they do not believe the objection to be made *bonâ fide*, and make an order for payment, this Court, on the order being brought up by certiorari, will quash it, upon affidavits showing that the justices had no reasonable ground for disbelieving the *bona fides*. *Regina v. Nunneley*, 852

- (6). Justices cannot refuse distress warrant, to enforce a poor-rate, unappealed against, on the ground that the rate is bad, 256. RATE, III. (2).

LANDLORD AND TENANT.

I. Construction of lease.

- (1.) Reservation to the landlord of the exclusive right to use a sewer on the tenant's premises. Extent of such easement.

Lease of land by plaintiff to defendant, reserving to plaintiff power to enter upon the land, and to dig and make a covered sewer and watercourse through it, in order to convey away the drainage from plaintiff's premises.

Plaintiff made a sewer accordingly: defendant made a drain from his own premises, and carried it into the sewer.

Held, that plaintiff was entitled to the exclusive use of the sewer; and that he could recover in an action against defendant for so interfering with such exclusive use. *Lee v. Stevenson*, 512

- (2). "Damage by fire excepted:" "all or any part of the rent hereby agreed to be paid," &c.

By agreement between F., the receiver appointed in Chancery for lands and buildings thereon, and J., it was recited that J. had expended money in improving the premises on the understanding that a lease thereof should be granted to him on the terms after-mentioned (pursuant to a previous agreement with parties at that time interested), in consideration whereof F. had consented to enter into this agreement. And it was witnessed that F., in consideration of the premises, and according to his power, agreed with J. to let to him, and J. agreed to take, the land, with the buildings thereon

lately converted at J.'s expense into a mill, and other buildings, to hold for twenty-one years at rent payable quarterly. And it was agreed that, when that agreement should have been approved of by the Court of Chancery, or the Master, or if it should be ascertained that such sanction was not necessary, a lease should be executed by F. to J. (and a counterpart by J.), under the terms in the agreement stipulated, which should contain covenants on the part of J. "to pay the said rent in manner before mentioned, damage by fire excepted," and to keep the premises in repair, and to deliver up possession of the premises "and all the present additions," "but not including any buildings not shown" on a plan endorsed, in good repair, "damage by fire excepted." And that, until the lease should be granted, F. might distrain "for all or any part of the rent hereby agreed to be paid." Provided that the agreement should be in all respects subject to the approbation of the Court of Chancery or the Master, F. undertaking to endeavour to obtain such approbation: but, if the approbation were refused the agreement to be void. J. entered into possession, and erected new buildings.

Held, that J. was tenant from year to year on such terms as would be inserted in a lease pursuing the agreement, so far as they were applicable to a tenancy from year to year.

That, if any part of the premises originally demised were destroyed by fire, the result would be, not to destroy or suspend the whole rent, but to entitle J. to a deduction from the rent according to the proportion which the annual value of the destroyed part bore to the annual value of the whole: taking (dubitante Crompton, J.), the whole to be the premises as originally demised, not as improved by subsequent additions made by J. *Bennett v. Ireland*, 326

[(3). Covenants to occupy premises only in a particular way, and not to underlet or charge, how broken. Waiver of breaches by acceptance of rent, when.

A lease of the Opera House contained covenants by the lessee, (1), that he would not convert the same to any other use than for performing operas, &c., but would use his utmost endeavours to improve the same for that use and purpose; and (2), that he would not grant, let, charge, &c., the boxes for a longer period than one year or season, nor charge nor encumber the theatre, or the term thereof, by mortgaging, or granting rent-charges, or any other encumbrance:—Held (affirming the judgment of the Queen's Bench and Exchequer Chamber),

First, that covenant (1) was not broken by the lessee not opening the theatre for two

seasons, and that it ought to be limited to keeping the house itself properly decorated and improved, with scenery and all appointments necessary to an opera house, and not that a lessee should be bound, at a loss, to keep it open for theatrical performances.

Secondly (concurring with all the Judges attending), that the first part of covenant (2) was not broken by granting, before the close of the current season, a lease of a box for the term of one year, to commence from the first day of the next season.

Thirdly (affirming the judgment of the Exchequer Chamber, which overruled that of the Queen's Bench, and according with the opinions of all the Judges summoned, except Crompton, J., dissentiente), that the latter part of covenant (2) was not broken by the giving *bonâ fide* warrants of attorney, the defeasance of which disclosed that they were given with the intention that judgments should be entered thereon, and that such judgments should be registered, and should stand as securities for debts, upon default in payment of which by a day named execution should issue; although, by the 1 & 2 Vict. c. 110, s. 13, on registration, such a judgment operates in all respects as a charge upon the lease, and also although this might be taken in execution under the judgment confessed.

Aliter, if the intention of the parties was clear and manifest to evade the covenant, and charge the lease in a circuitous manner. Wightman, J., was of opinion that the intention so to do was manifest in this case.

By all the Judges present (though the judgment of the House on the above points rendered it unnecessary to decide the two remaining questions), that a proviso for re-entry, "or if the lessee shall make default in the performance of any other covenants, &c., which on his part are or ought to be observed, performed, or kept," would apply to and forbid the breach of a negative as well as a positive covenant.

Where the lessee tendered rent which had accrued subsequently to breaches of covenant, as rent, but the lessor took it as compensation for occupation, expressly reserving the right of re-entry, it is, by force of the rule "*solutio accipitur in modum solventis*," a waiver of the forfeiture in respect of such breaches as were known to the lessor.—By a majority of the Judges, (Crompton, J., dissenting).

Waiver also of known and unknown breaches, where the latter differed not in circumstances from those he knew of.—e. g. several breaches of the same covenant.—Per Erle, J.

Waiver of all the breaches before the accrual of the rent received.—Per Watson, B. But,

Per Crompton, J., the receipt of such rent is not necessarily a waiver; but the question is, was it in fact received with an intention to waive, and declare the lease still in force. The rule relied on applies only to the case of two distinct debts or demands, and an appropriation by the payer to one of them.

Semble, Lord Wensleydale, accord. *sed obiter*. *Croft v. Lumley*, 1069]

II. Distress.

Action for detaining goods under a distress: when it lies.

An action lies for detaining goods taken, under a distress for rent, after a sufficient tender made before impounding. *Loring v. Warburton*, 507

LANDS.

Sale of an interest in. STATUTE OF FRAUDS, I.

LAND TAX.

Not to be deducted from the gross annual value of a tithe commutation rent-charge, in calculating the net annual value, I. RATE, I. (1).

LEASE.

LANDLORD AND TENANT.

LESSOR AND LESSEE.

LANDLORD AND TENANT.

LIBEL.

I. Right of action.

(1). Against a corporation aggregate, for libel. What amounts to malice.

A count against a railway company, being a corporation aggregate, for a malicious libel, is good on demurrer; for a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice in law sufficient to support the action.

And, *semble*, there may be circumstances by which express malice in fact might be proved, such as to make a corporation aggregate liable therefor in its corporate capacity. *Whitfield v. South Eastern Railway Company*, 115

(2). Privileged publication. How far publication of proceedings at a preliminary investigation of a criminal charge, before a magistrate, is privileged.

The rule, that the publication of a fair and correct report of proceedings taking place in a public Court of justice is privileged, extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge,

terminating in the discharge, by the magistrate, of the party charged.

A declaration for libel set out, in three separate counts, reports of three separate days' proceedings, respectively (on two adjournments), before a magistrate; the report of the first day stating that plaintiff was charged with perjury, and an adjournment, but reserving the report; the report of the second day also stating an adjournment in language intimating that there would be a report of the proceedings of the day to which the adjournment was; and the third stating the discharge of the party charged: and the jury found generally that the reports were fair and correct. Held: that the reports of the first two meetings did not lose the privilege by reason of the proceedings there reported not being final.

One of the reports commenced, "Wilful and corrupt perjury." Held that, after the verdict of the jury, this must be taken as a description of the nature of the charge, not as an imputation, by the publisher, of the perjury in fact.

One of the reports stated that the evidence before the magistrate entirely negatived the story of the plaintiff, which story was the statement of the plaintiff in which the imputed perjury was contained. Held, not to be privileged; and a plea, justifying this report on the ground that it was a fair and correct report of the proceedings which had taken place, was held bad after verdict. *Lewis v. Levy*, 537

II. Form of declaration.

Under Common Law Procedure Act, 1852, 346. EVIDENCE, II. ii.

LIEN.

I. Claim of, on a ship, by shipwrights, for costs of detention of ship in their dock, after repairing, the repairs not having been paid for: held bad.

Shipwrights contracted with the owners of a ship to do repairs on the ship in the shipwrights' graving dock; in the contract a provision was made that a lump sum should be paid for the use of the dock, the other charges being on a quantum meruit.

The ship was repaired in the dock; and the owners were not prepared to pay the price. The shipwrights gave notice that they should detain the ship and claim 21*l.* a day for the use of the dock during the detention. The shipowners finally paid the amount claimed, together with the sum claimed for the dock-rent, under protest.

Held by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the shipwrights had no lien for the use of the dock during the detention. *British Empire Shipping Company v. Somes*, 553

II. Contingent claim of lien by vendor for price of goods: how and when destroyed by his acceptance of a delivery order by vendee to a third party, 448. *VENDOR AND VENDEE*, II.

LIGHTING RATE.

Under Metropolis Local Management Act.
METROPOLIS LOCAL MANAGEMENT ACT, III.

LIMITATION.

Of actions. *STATUTE OF LIMITATIONS*.
Of estate. *DEVISE*.

LIMITED LIABILITY.

BILLS OF EXCHANGE AND PROMISSORY NOTES,
I. I.

LIQUIDATED DAMAGES.

DAMAGES, III.

LUNATIC.

Pauper. *POOR*, I. I. (1).

MAINTENANCE.

CONTRACT, VI. iv.

MAINTENANCE.

Order of. *POOR*.

MALICE.

In libel and slander. *LIBEL*.

MANDAMUS.

I. Where it lies, and does not lie, in particular cases.

i. Where it lies.

Refusal of vestry, summoned under 5 & 6 Vict. c. 109, for the purpose of making out a list of persons competent to serve as parish constables, to make out such list: *mandamus*, 519. *CONSTABLES*.

ii. Where it does not lie.

To the visitors of the College of Doctor's Commons, to inquire into the proceedings of the College under stat. 20 & 21 Vict. c. 77, ss. 116, 117, 863. *DOCTOR'S COMMONS*.

II. Application for.

For *mandamus* to Quarter Sessions to enter continuances and hear an appeal: within what time to be made.

There having been no fixed rule of practice as to the time within which an application for a *mandamus* to the Sessions to enter continuances and hear an appeal must be made, this Court ordered that in future such applications must be made not later than in the Term following the Sessions at which the refusal was made, unless special circumstances appear by affidavit to account for the delay to the satisfaction of the Court.

If notice of chargeability and statement

of grounds of removal be put into the post on one day and received by parish officers on the next, the latter is the day on which they are "sent;" and it is sufficient, within stat. 11 & 12 Vict. c. 31, s. 9, if the application for the depositions be received by the clerk to the justices on the twenty-first day thereafter, reckoning one day inclusively and another exclusively. *Regina v. Recorder of Richmond*, 253

III. Form of writ.

Refusal by mayor and assessors of a borough to revise burgess lists. *Peremptory mandamus*, a new mayor having meanwhile come into office. How the writ is to be directed, 1024. *MUNICIPAL CORPORATIONS REFORM ACT*, I.

IV. Return. What is an obedience to the writ.

Stat. 18 & 19 Vict. c. 108, s. 14, enacts that penalties imposed by the Act may be recovered within three months of the commission of the offence. Within three months of the commission of an alleged offence, an information was laid before magistrates who, within the three months, refused to hear. After the expiration of the three months a *mandamus* issued commanding them to hear. They returned that, since the issuing of the writ, they had heard, when it appeared to them that the party charged was protected, by the lapse of time, and they had therefore dismissed the information. On demurrer to the *mandamus*:

Judgment for defendants, on the ground that they had obeyed the writ by deciding the case, whether their decision was right or wrong.

Semble, per Lord Campbell, C. J., and Crompton, J., that it was right: per Coleridge, J., and Erle, J., that it was wrong. *Regina v. Mainwaring*, 474

MARRIAGE.

Breach of promise of. *CONTRACT*, VI. i.; v. (1).

MASTER AND SERVANT.

I. Responsibility of master to servant.

For injury received by the latter in the course of the service.

A master is responsible to his servant for the injury received in the course of his service, if it be shown to have been occasioned by the personal negligence of the master. Such negligence may be brought home to the master by showing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants, whose incompetency was the cause of the accident: but in the absence of a special contract, the master is not liable for an accident not proved to have been occasioned by his personal negligence. *Ormond v. Holland*, 102

II. Responsibility of master for negligence of servant.

Action lies by a passenger against the owners of a crew, paid by them and supplied, with the ship, to a third party for hire, for the negligence of such crew.

H., the lessee of a ferry, hired from defendants, for one day, a steam-tug and crew, to assist in carrying his passengers across. He received the fares: and defendants were paid by him for the hire of the tug; they sent and paid the crew. Plaintiff, who had contracted with and paid H. for being carried across the ferry at all times during one year, went on board the tug, from H.'s pier, as a passenger, for the purpose of crossing. By the negligence of the crew some tackle broke; and plaintiff, while on board, was injured.

Held, that he was entitled to recover against defendants for such negligence. *Dallryll v. Tyrer*, 899

MEMORANDA.

Easter Term, 1858, 1.

Easter Vacation, 1858, 325.

Trinity Term, 1858, 872.

METROPOLIS LOCAL MANAGEMENT ACT.

(18 & 19 Vict., c. 120.)

I. Sects. 68, 76, 204. Power of District Board to recover expenses of reinstating sewers. Construction of "sewer."

A wall had been erected from time immemorial on land adjacent to a tidal river; and it kept out from such land the river at high water, the land being drained into the river by drains at a considerable distance from the wall. Before stat. 18 & 19 Vict. c. 120 (Metropolis Local Management Act), the wall was within the jurisdiction of The Metropolitan Commissioners of Sewers; and it was within a district mentioned in Schedule (B.) to that Act. K., the occupier of the land on which the wall stood, cut away part of the wall, and built houses thereon, without the consent and in violation of the express prohibition of The Board of Works of the District. The Board demolished the houses, reinstated the wall, and claimed the expenses from K.

Held that the wall was a sewer, and that The District Board was entitled to claim the expenses, under sects. 68, 204.

Also, that the board might recover the expenses under sect. 76, although no foundation for the houses had been dug out, but they were simply erected on the surface of the ground.

It appearing that K. had applied for permission to The District Board of Works, and had in his correspondence with them treated the matter as exclusively within their juris-

diction, and that The Metropolitan Board of Works had not interfered or exercised any jurisdiction over the wall: Held, that it was not competent to K. to resist the claim of The District Board on the supposed ground that the statute vested the wall in The Metropolitan Board of Works.

Admitted, that no claim could be sustained by The District Board for the expense of obtaining the advice of counsel. *Poplar Board of Works v. Knight*, 408

II. Sects. 130, 250. What is a "street," within those sections, which the vestry are bound to light.

An unfinished road (in a parish mentioned in Sched. (A.) of the Metropolis Local Management Act, 18 & 19 Vict. c. 120), containing inhabited houses along part of it, communicated, at one end only, with another road containing houses placed singly at long intervals. The soil of such unfinished road was private property; and the road itself had not been dedicated to the public.

The vestry of the parish refused to light the road under sect. 130. On a motion for mandamus to compel them to do so, this Court discharged the rule, on the ground that the vestry were not bound to treat the road as a street under sects. 130, 250. *Regina v. St. Mary, Islington*, 743

III. Sect. 161. General, lighting, and sewers rate.

(1). Owner of a tithe commutation rent charge liable to the two first: when, and when not, to the last, 1. *RATZ*, I. (1).

(2). Assessment upon a parish of which the rateability, to poor-rate had been regulated by a local Act (5 G. 4, c. cxxvi.).

Under the Metropolis Local Management Act (18 & 19 Vict. c. 120), sect. 161, the only rates which the vestry are authorized to make are a sewers-rate, a lighting-rate, and a general rate: and no other rates but the sewerage and lighting rates can be made independently of and distinct from such general rate.

By a local Act (5 G. 4, c. cxxvi.), all hereditaments whatsoever in the parish of P. were made rateable upon one and the same scale to poor-rates: but in respect of paving, watching, and lighting rates under the Act, premises unoccupied, or in certain stages only of completion, were to be assessed respectively at certain lower rates than the rest.

Held that, under sect. 161 of The Metropolis Local Management Act, which provides that the several rates under that Act shall be assessed upon the same principle as the poor-rates in each respective parish, all hereditaments in P. were rateable upon one scale, without any exemption. *Regina v. Great Western Railway Company*, 600

IV. Sect. 197. Exception, from the jurisdic-

tion of parish auditors, of accounts which, before the Act, would have been subject to the audit of an auditor under stat. 4 & 5 W. 4, c. 76.

The proviso to sect. 197 of the Metropolis Local Management Act (18 & 19 Vict. c. 120), which excepts from the jurisdiction of parish auditors appointed under the Act all accounts which, before the passing of that Act, would have been subject to the audit of an auditor appointed under stat. 4 & 5 W. 4, c. 76, is not repealed by sect. 3 of stat. 19 & 20 Vict. c. 112: and the Poor Law Commissioners have therefore still the right to order the overseers or guardians of any parish to appoint an auditor to audit the poor law accounts.

A select vestry, under a local Act (59 G. 3, c. xxxix.), annually elected forty of their own body to be "directors" of the poor, who were, by the Act, to exercise the functions of "overseers." The vestrymen were to appoint, and fix the salaries of, all the parish officers, and the visitors for the relief of the poor; but all these officers, and the visitors, were to be paid by, and act under the control and direction of, the directors. The vestrymen were to make, levy, and assess the rates; but the distribution of the moneys thence arising, including the portion devoted to the relief of the poor, was in the directors.

Held, that the directors, and not the directors and vestrymen jointly, were the parties filling the position of "guardians or overseers" of the parish, within stat. 4 & 5 W. 4, c. 76, ss. 46, 109; and that therefore the order of the Poor Law Commissioners, for the appointment of a poor law auditor for the parish, was rightly directed to the directors alone. *Regina v. Directors of St. Pancras*, 583

METROPOLITAN BUILDING ACT.

(18 & 19 Vict. c. 122).

Sects. 3, 51. Fees to surveyor from owner of building. Owner in fee of the land on which the building is erected, letting it on a peppercorn rent, not liable.

Under sect. 51 of The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), an owner of land in fee simple who lets it on a building lease at a peppercorn rent is not liable, as owner, to the surveyor for fees in respect of buildings afterwards erected on such land, a peppercorn rent not being within the meaning of the words "of the whole or of any part of the rents or profits of any land or tenement" in the interpretation clause, sect. 3. *Eselyn v. Whickcord*, 126

MIDDLESEX.

County Sessions for. CLERK OF THE PEACE.

MONEY HAD AND RECEIVED.

ACTION.

MUNICIPAL CORPORATIONS REFORM ACT.

(5 & 6 W. 4, c. 76.)

I. Sect. 18. Refusal by mayor and assessors to revise burgess lists. Peremptory mandamus, a new mayor having meanwhile come into office. How the writ is to be directed.

Mandamus directed to the Mayor and assessors of R., a borough within the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, comprising several parishes. It contained suggestions that, at the court holden in October, 1856, before the Mayor and assessors for the revision of the burgess lists of that year, the Mayor and assessors refused, for insufficient reasons, to revise the lists. Mandatory part commanding the Mayor and assessors to hold a court and revise the list for the parish. The writ was tested in January, 1857. There was an insufficient return, and a demurrer thereto. The Court of Queen's Bench having awarded a peremptory mandamus:

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the mandamus was properly directed to the existing Mayor and assessors to hold the Court, and revise the list of the past year.

By Pollock, C. B., Martin, B., and Willes, J.; dissentientibus Williams and Crowder, Js. *Mayor of Rochester v. The Queen*, 1024

II. Sect. 58. Appointment of treasurer. Bond by appointee and surety: duration of surety's liability.

The condition of a bond recited that S. had been appointed, under stat. 5 & 6 W. 4, c. 76, treasurer to a borough; and declared that it had been agreed that the obligor should join with S. in the bond for the due performance of the office: and the condition was declared to be that, if S. should duly perform the office according to the provisions of the said statutes, and of such statutes as might be thereafter passed relating to the said office, the bond should be void, otherwise, &c.

In a declaration by the obligee against the obligor, it was averred that, under the appointment in the condition mentioned, and divers subsequent annual appointments in every successive year, S. continued to be treasurer from the time of the execution of the bond till stat. 6 & 7 Vict. c. 89, passed, when S., in accordance with the last-mentioned Act, was appointed treasurer, and held office during the pleasure of the council till his death; and that the office, at S.'s last appointment, and until his death, continued, in its nature, functions, and duties, to be the same office as that mentioned in

the condition. A breach was then assigned, alleging a malversation by S., while he remained treasurer as aforesaid, not stated to have occurred within the year from his first appointment, but, to wit, on a day named, which was subsequent to the appointment under stat. 6 & 7 Vict. c. 89.

Declaration held bad on demurrer. For that, under stat. 5 & 6 W. 4, c. 76 (sect. 58), the appointment mentioned in the condition was for one year only; and the liability of the obligor could not extend to the holding under stat. 6 & 7 Vict. c. 89, which (sect. 6) makes the office to be an office held during the pleasure of the council. *Mayor of Cambridge v. Dennis*, 660

NEGLECTANCE.

Action for.

I. At common law. Where it lies, and does not lie, in particular cases.

i. Where it lies.

(1). Negligence of master, causing injury to servant in the course of the service: under what circumstances the master is liable, 102. MASTER AND SERVANT, I.

(2). Action lies, by a passenger, against the owners of a crew, paid by them, and supplied, with the ship, to a third party for hire, for the negligence of such crew, 899. MASTER AND SERVANT, II.

(3). Action for negligence against a railway company, as carriers. Pleas of "special contract," and "just and reasonable" "conditions," under The Railway Traffic and Canal Act, 958. CARRIERS.

ii. Where it does not lie.

On behalf of an infant of tender years, for injury caused by the joint negligence of the defendant and the party who had the charge of the infant.

P. had charge of a child too young to take care of itself, and took two tickets at a railway station for the purpose of the two being conveyed on the railway. While P. and the child were on the railway, after P. had taken the tickets, the child was injured by an accident which was caused by the joint negligence of P. and the company's servants.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the child could not maintain an action against the company. *Waite v. North Eastern Railway Company*, 719

II. By statute.

Action, under stat. 9 & 10 Vict. c. 93, by husband, administrator of wife, for negligence causing her death. Proper form of declaration, 168. EXECUTOR, I.

NET.

FISHING.

NOTICE.

Of action. ACTION, III. i.

Of appeal. APPEAL, II.

OCCUPATION.

I. Beneficial. RATE.

II. By owner of land enclosed adjoining highway. His liability to repair, 949. HIGHWAY, II.

PARISH.

What is, within the meaning of sects. 10, 32, of stat. 15 & 16 Vict. c. 85. (Burials Amendment), 264. BURIAL ACTS.

PARSONAGE.

Money paid for rebuilding, to governors of Queen Anne's Bounty, by owner of a tithe commutation rent-charge: not to be deducted, in calculating net annual value, I. RATE, I. i.

PASSENGER ACT, 1855.

(18 & 19 Vict. c. 119).

SHIP, I.

PASSENGER SHIP.

SHIP, I.

PATENT.

Action for infringement of. Evidence.

A patent was entitled "Treating chemically the collected contents of sewers and drains in cities, towns, and villages, so that the same may be applicable to agricultural and other useful purposes." The description of the process stated that, for the purpose of precipitating the matter, the patentee preferred to employ hydrate of lime; and he claimed the precipitation of animal and vegetable matter from sewage water by the means before described. It stated that the invention consisted in the use and application of a chemical agent for the purpose of precipitating the solid animal and vegetable matter contained in sewage water; and that what was claimed was the precipitation of animal and vegetable matter from sewage water by means of the chemical agent before described.

In an action for an infringement of this patent, it appeared that defendant had applied the process and the hydrate of lime for the purpose of deodorizing sewage water: in the course of which some precipitate of animal and vegetable matter was produced, which, however, defendant did not use as an article of value, but *bonâ fide* rejected as an article accidentally produced.

Held, that this was no evidence for a jury of the infringement of the patent. *Higge v. Goodwin*, 529

PAUPER.

POOR.

PAWNBROKER.

Injury to goods pawned while on the pawnbroker's premises: under what circumstances he is responsible, under stat. 39 & 40 G. 3, c. 99, s. 24.

Under stat. 39 & 40 G. 3, c. 99, s. 24, the injury done to goods pawned, by an accidental fire on the premises of a pawnbroker, not affirmatively shown to have occurred through the default, neglect, or wilful misbehaviour of the pawnbroker, does not authorize a justice to give satisfaction to the pawner; there being no *prima facie* presumption that such fire is owing to the default, &c., of the owner of the premises.

When a case is stated under stat. 20 & 21 Vict. c. 43, sect. 2 is satisfied if the appellant within three days of his obtaining the case from the justice, seeks to find the respondent, but cannot do so, and within such three days, gives notice to the attorney who represented the respondent before the magistrate, and, after the expiration of the three days, gives notice to the respondent, who does not object. Under such circumstances, the Court will hear the appellant though the respondent does not appear. *Syred v. Carruthers*, 469

PENALTIES.

Information for, required by statute to be recovered within a given time. Refusal of justices to hear: *mandamus*. Return, that, since the writ, they had heard and dismissed as being too late. *Demurrer*, 474. *MANDAMUS*, IV.

PLEA.

PLEADING, III.

PLEADING.

I. Writ of summons.

In an action on a judgment, particulars may be endorsed under sect. 25 of The Common Law Procedure Act, 1852, 884. *COMMON LAW PROCEDURE ACTS*, I. i.

II. Declaration.

(1). Action, under stat. 9 & 10 Vict. c. 93, by husband, as administrator of wife, for negligence causing her death. Proper form of declaration, 168. *EXECUTOR*, I.

(2). Action for libel or slander. Form of declaration, under The Common Law Procedure Act, 1852, 346. *EVIDENCE*, II. ii.

III. Plea.

(1). Action by payees of a promissory note against a joint and several maker. Plea, that one of plaintiffs was one of the joint makers, and therefore liable to contribution. Held bad, 442. *BILLS OF EXCHANGE AND PROMISSORY NOTES*, II.

(2). Action for breach of promise of marriage. Plea, that, before breach, defendant became afflicted with a disease, making it dangerous for him to marry, &c. Held bad, 747. *CONTRACT*, VI. (1).

(3). Action for breach of promise of marriage. Plea, that, before agreement, plaintiff and a third party had agreed to marry, which agreement was still in force, and had been withheld from defendant. Held bad, no fraud being alleged, 796. *CONTRACT*, VI. v. (1).

(4). Action against a railway company. Plea, that a month's notice of action had not been given, as prescribed by the special Act. Held bad, for want of an averment showing that the action fell within the class described in the Act, 837. *RAILWAYS CLAUSES CONSOLIDATION ACT*.

IV. Replication.

Action in the name of a nominal plaintiff. Pleas of payment to, and discharge and release by, such plaintiff. Equitable replication, 461. *COMMON LAW PROCEDURE ACTS*, II. ii.

POACHING.

Information for, before justices, under stat. 1 & 2 W. 4, c. 32. Party charged not competent or compellable to give evidence against himself, under Evidence Amendment Act, 91. *EVIDENCE*, I.

POLICE.

Non-rateability, to poor-rates, of building occupied by county police, for police purposes, 225. *RATE*, I. (4).

POLICY.

INSURANCE.

POOR.

I. Settlement of.

i. Evidence of.

(1). Of birth settlement: order of adjudication and maintenance: jurisdiction of justices.

For the purpose of showing a birth settlement in C., a witness was called who proved that she was the sister of the pauper's mother, who was the witness's senior by ten years; that the witness first remembered herself and the pauper's mother living with their parents in C. It was also proved that the father and mother of the pauper's mother were married in C., and that the witness aforementioned, the pauper's mother, and another sister, were baptized in C. Held, sufficient evidence.

Orders of adjudication and maintenance, made by justices of the city and county of E. in the county of D., under stat. 16 & 17 Vict. c. 97, s. 97, recited an order of justices of E., made in pursuance of the statute, whereby F. (the person to whom the adjudication related), being neither a pauper nor wandering, but a person not under proper care and control, and a proper person to be taken

charge of and detained, was "duly sent" from S. in E., to the lunatic asylum in the county of D.; and recited further that the said F. had been confined therein to the then present day "as such pauper lunatic," and still remained there at the charge of S.; and that complaint had been made by the parish officers of S., that F. was not legally settled in S. The order then adjudicated that the settlement was in C., and ordered C. to pay maintenance, &c.

It was objected that the jurisdiction of the justices, to make the order sending F. to the asylum, did not appear in the recited order; that it was not expressly found that F. was a lunatic, nor that the asylum to which F. was sent was that to which she ought to have been sent, nor how F. became chargeable to S.

Held, that the jurisdiction to make the order of adjudication and maintenance sufficiently appeared, it not being shown that the recited order did not contain all proper requisites; and, *semble*, that the mere fact of the lunatic being found in the asylum, at the charge of S., gave the justices jurisdiction to make the orders of adjudication and maintenance.

C. was a parish in an Union. The order of maintenance was addressed to the Board of Guardians and their clerk, and recited an application by the parish officers of S. for an order on the clerk for payment of the expenses; and it then ordered the clerk to pay.

Held, that this was, in substance, an order on the Guardians. *Regina v. Inhabitants of Crediton*, 231

(2). Of settlement by apprenticeship, under an indenture.

To prove a settlement by apprenticeship, evidence was given that proper search had been made for an indenture, but in vain; and a person was called who deposed that, more than sixty years back, he worked with the same master as the pauper, and always believed him to be apprenticed to that master; that the pauper was instructed there by a journeyman, and lodged and boarded in the house, with two others who were apprentices.

Held, that this was evidence from which a settlement by apprenticeship, under an indenture, might be presumed. *Regina v. Inhabitants of Fordingbridge*, 678

ii. Order of removal.

(1). Grounds of removal, sent to parish officers by post: when held to be "sent," 253. *MANDAMUS*, II.

(2). Appeal against order of removal, within what time to be made. Rule as to notice of trial and entry of appeal, 713. *APPEAL*, II.

II. Appointment and functions of parish officers.

i. Guardians and overseers.

(1). "Directors" of the poor, elected under a local Act (59 G. 3, c. xxix.), held "guardians or overseers" within stat. 4 & 5 W. 4, c. 6, ss. 46, 109, 583. *METROPOLIS LOCAL MANAGEMENT ACT*, IV.

(2). Contract by Guardians, not under seal. What are incidental and necessary purposes, 873. *CONTRACT*, III.

H. Poor law auditor.

The right to order his appointment by the overseers or guardians of a parish is still in the Poor Law Commissioners, 583. *METROPOLIS LOCAL MANAGEMENT ACT*, IV.

III. Poor's-rate. *RATE*.

POST.

Transmission by, to parish officers, of notice of chargeability and statement of grounds of removal, 253. *MANDAMUS*, II.

PREMIUM.

INSURANCE.

PRINCIPAL AND AGENT.

I. Contract by agent, for an unnamed principal, with a special clause exempting the agent from liability, 930. *SHIP*, IV.

II. Evidence of mercantile usage that, in a particular class of contracts, a broker not disclosing his principal may be treated as principal, 1004. *CONTRACT*, V. i. (2).

PRINCIPAL AND SURETY.

Bond by, for the performance, by the principal, of the office of treasurer, under stat. 4 & 5 W. 4, c. 76. Duration of surety's liability, 660. *MUNICIPAL CORPORATIONS REFORM ACT*, II.

PROBATE.

EXECUTOR.

PROMISSORY NOTE.

BILLS OF EXCHANGE.

PROPERTY TAX.

Tenant's. To be deducted from gross value of a tithe commutation rent-charge, in calculating the net annual value, 1. *RATE*, I. i.

PROSTITUTES.

DISORDERLY HOUSE.

PUBLIC HEALTH ACT, 1848.

(11 & 12 VICT. c. 63.)

Sect. 88. Exemption, in certain cases, from district rates. To what class of property it applies.

The proviso in sect. 88 of The Public Health Act, 1848 (11 & 12 Vict. c. 63), which

exempts from General or Special District Rates under the Act any kind of property in the district which, before the Act, had by any local Act been exempted from rating in respect of all or any of the purposes for which General or Special District Rates may be made under The Public Health Act, 1848, in respect of the same purpose and to the same extent, applies only where the exemption in the local Act was in respect of the kind of property, and not where it was only in respect of its locality.

A local Act (5 G. 4, c. xxii.) described the property rateable to be gardens, tenements, and hereditaments, adjoining to or upon streets, &c., built or thereafter to be built, within the populous or town part of the borough of P., or at no more than a certain distance from streets, &c. Held that this was not an exemption in respect of kind, and that the exempting proviso of sect. 88 of the Public Health Act, 1848, was therefore inapplicable to gardens, tenements, &c., though without the limit prescribed in the local Act. Per Lord Campbell, C. J., Wightman and Crompton, J.; dissentiente Erle, J. *Plymouth General District Rate*, 691

RAILWAY COMPANY.

COMPANY.

RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

(8 & 9 VICT. c. 20.)

Sect. 138. "Principal office," what is. Service of notice of action.

The Great Western Railway Company, by the Act (5 & 6 W. 4, c. cvii.) incorporating them, were to have two termini, one at Bristol, the other at Paddington in Middlesex; two general half-yearly meetings were to be held, one at Bristol, the other at Paddington; an equal number of directors was to be chosen from the residents near each place. All the general business was transacted at Paddington, where the secretary resided, and where orders were issued. Held, by the Court of Q. B., that Paddington was the only "principal office" of the company within sect. 138 of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20.

By the Incorporating Act it was provided that no action should be brought "against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the powers or authorities or any of the orders made, given, or directed in, by, or under this Act," without certain notice. To a declaration against the company for money had and received, and on accounts stated, the company pleaded that the action was brought after the passing of the statute, and no notice had been given pursuant to the statute. After verdict, and judgment for

defendants, Held, in the Exchequer Chamber, that the plea was bad, and judgment was reversed, for the want of an allegation showing that the action fell within the class described in the section. *Carton v. The Great Western Railway Company*, 837

RAILWAY TRAFFIC AND CANAL ACT.

(17 & 18 VICT. c. 31.)

CARRIERS.

RATE.

FIRST: Poor-Rate.

I. Calculation of rateable value.

(1). Rateability of the owner of a tithe commutation rent-charge; net annual value, how to be calculated: what are proper deductions.

The owner of a tithe commutation rent-charge, constituted under stat. 6 & 7 W. 4, c. 71, is rateable to the poor in respect thereof, in analogy to the principles established by stat. 6 & 7 W. 4, c. 96.

The owner is entitled to deduct the expenses of collection (including law expenses) and losses by non-payment.

He is also entitled to deduct the poor-rate: and it makes no difference, as to this, that, previously to the making of the commutation, the tithes had been compounded for on the principle of the composition being paid free from rates, and that, in making the commutation, allowance had been made for this, under stat. 6 & 7 W. 4, c. 71, s. 37, by increasing the commutation rent-charge accordingly.

The owner is liable, under stat. 18 & 19 Vict. c. 120, s. 161, to a General Rate, and to a Lighting-Rate, although, under a previous local Act, the tithe-owner was not liable to a lighting-rate, sect. 165 exempting only land previously exempt; and he is entitled, in the assessment to the poor-rate, to a deduction in respect of both these rates.

But he is not liable to a Sewers-Rate, under sect. 161, the tithes not having been previously rated to the sewers-rate, and sect. 164 being applicable: and he is therefore not entitled, in an assessment to the poor-rate, to any deduction in respect of this.

He is not entitled to a deduction in respect of the Land tax.

He is entitled to a deduction in respect of the tenant's Property tax, Tenths, and Ecclesiastical dues.

If he pays a curate, or a minister of a district chapel, voluntarily, he is not entitled to make any deduction in respect thereof; but, if such payment be legally demandable from him (as where the bishop can insist on the payment of a curate, or in the case of a church building Act), he is entitled to deduct in respect thereof. So he is, if a curate

be paid because, owing to the magnitude of the cure, it is impossible for the owner of the rent-charge to discharge the ministerial duties without such assistance. But the owner is not entitled to any deduction in respect of his own personal services.

He is not entitled to deduct sums paid to the Governors of Queen Anne's Bounty in liquidation of interest and part principal of money borrowed by him, under stats. 17 G. 3, c. 53, and 1 & 2 Vict. c. 23, for rebuilding his parsonage-house.

Per Lord Campbell, C. J., Erle and Crompton, Js., dissentiente Coleridge, J., an additional sum for tenants' profits should be deducted, only if there be any such necessary to induce a tenant, after allowance for collection, bad debts, and law expenses, to take the rent-charge: and this is a question of fact for the Sessions.

The general rule is that the amount must be ascertained as that at which a tenant might reasonably be expected to take the rated property from year to year. *Hackney and Lamberhurst Tithe Commutation Rent-Charge*, 1

(2). Poor-rate to be deducted from gross annual value of a tithe commutation rent-charge, in calculating net annual value, 1. *Supra*, I. (1).

(3). Confirmation, by Sessions, of appeal against a poor-rate. Sessions, having determined the amount and value, not bound to determine the particular portion, of appellant's land within the parish.

W. appealed against a poor-rate by which he was rated in the parish of H. as occupier of land to an amount named and of a value named. The Sessions affirmed the rate, subject to a case which stated that W. did occupy that quantity of land in H.; and that it was of the value stated: but that he also occupied land in the adjacent parish of C.; and that it was not known which portion of the land was in H. and which in C., though the quantity occupied in each was known, and the value was rightly assessed whichever portion was in H. Held that the rate should stand, the Sessions not being bound to determine the particular portion which was within H. *Regina v. Woods*, 481

(4). Buildings occupied by County Police, for Police purposes, not rateable.

Buildings were provided by justices of a county, under stats. 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, for a police district of a county. The furniture belonged to the justices, who paid for it out of the police-rate. The buildings consisted of premises used exclusively for the police offices, cells, and rooms for the residence and accommodation of the police sergeant and constables, who resided there (one of them with his wife), and had a deduction made from their wages

in respect of the rent: but they enjoyed no accommodation more than was necessary for their convenient occupation in their official capacity, and for the purposes for which they were placed there.

Held, that the buildings were occupied exclusively for public purposes, and the justices were not rateable to the poor in respect thereof. *Justices of Lancashire v. Overseers of Stretford*, 225

II. Assessment.

Rate quashed, but levied and taken, under stat. 41 G. 3, c. 23, as payment on account of the next effective rate.

A poor-rate was made in January, quashed on appeal, but was levied, under stat. 41 G. 3, c. 23, the amount to be taken as payment on account of the next effective rate on the parish. The next effective rate was made in June; but, the parish being in want of money, it was arranged between the rate-payers generally and the overseers that the June rate should be levied in full, the payments of the quashed rate being to be allowed in the collection of the next rate. A rate being subsequently made in October, the overseers, being apprehensive that they might be surcharged if they carried out this arrangement, applied for a distress warrant to levy the October rate in full against the occupant of a house, whose predecessor had paid the quashed rate. The justices refused to issue their warrant. On a rule to order them so to do:

Held, by the whole Court, that the payment of the quashed rate was to be taken as payment on account of the next effective rate, which in this case was that made in June, and could not be taken as payment.

Held by Lord Campbell, C. J., and Wightman, J., that the rule ought to be made absolute.

But held by Erle and Crompton, Js., that to enforce the payment in full, in frustration of the arrangement, would be unjust; and that this Court, in its discretion, ought not to enforce such injustice.

The Court being equally divided, the rule dropped. *Regina v. Justices of Kingston and Wedd*, 259

III. Enforcement.

(1). Order on parishes of a Union for payment of a Union debt incurred during a previous year, and fraudulently left unpaid by the then collector: held bad.

The Union of L., formed under stat. 4 & 5 W. 4, c. 76, consisted of ninety-eight parishes, and had a Board of Guardians annually elected. In February, 1857, large sums were owing to tradesmen for food, &c., supplied to the poor of the Union, and which had been incurred principally in 1856, and partly in preceding years. The arrears were owing to embezzlements by M. and P. M. had

been appointed by the Guardians collector for nine of the parishes; which appointment had been confirmed by the Poor Law Commissioners. P. was assistant clerk of the Guardians. The Guardians had ordered M. to pay the rates collected for the nine parishes to the treasurer of the Union. M. appropriated the greater part, and, in concert with P., made false entries in the Union ledger, representing the sums as having been all paid to the treasurer. The accounts made out from these entries were produced to the auditor and certified by him as correct. P. had appropriated checks drawn in favour of tradesmen, which were entered as payments in the accounts which were audited and passed as correct. The Guardians had also overdrawn the treasurer's account to a large amount accruing during several years before February, 1857. The embezzlements by M. and P., and the consequent arrears to the tradesmen, were first discovered in December, 1856. No call was after that made on the parishes until February, 1857, when the then clerk of the Union, under article 81 of The Consolidated Order made 24th July, 1847, by the Poor Law Commissioners, ascertained the costs to each parish for the maintenance of the poor, estimating as "extraordinary charges" for the ensuing half year the amount of the arrears to the tradesmen and the debt to the treasurer, and divided the whole among the different parishes: and the Guardians, under article 82, made orders, on 17th February, 1857, on the overseers of the several parishes for payment. A parish, not being one of the nine for which M. collected, disputed the validity of the order. All previous calls had been paid.

Held (before stat. 22 & 23 Vict. c. 49), that the order was wholly bad, as being partly in the nature of a retrospective rate, though in fact there were items, besides those mentioned, free from objection.

The more so, as it appeared that there had been great changes in the occupation of rateable property in the parish.

By the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench. *Waddington v. Guardians of London Union*, 370

(2). Application for distress warrant to enforce poor-rate, unappealed against: justices cannot refuse on the ground that the rate is bad.

A poor-rate, good on the face of it, had not been appealed against. On an application before justices to issue a distress warrant to enforce payment of the rate, it was made to appear that there were substantial grounds for contending that the rate was retrospective, and therefore bad. The justices refused to issue their warrant. On an application

to this Court for a rule to command them to issue the warrant:

Held, that the justices were not justified in inquiring whether there was a ground of appeal against the rate, and refusing their warrant on that ground. And this Court made the rule absolute. *Regina v. Justices of Kingston and Philips*, 256

IV. Charge on.

Charge on poor-rates, to be paid off in five years, for expenses of parish survey: a charge on the rates generally.

A charge was made on the poor-rates of a parish for the expenses of a survey and valuation of the parish made under stat. 6 & 7 W. 4, c. 96, s. 3. In the bond creating the charge were inserted provisions for paying off not less than one-fifth of the sum charged, with interest, in each succeeding year, till the whole was repaid. More than five years having elapsed since the making of the bond, and the whole sum not having been discharged, the bondholder obtained a rule *Nisi* for a mandamus to the officers of the parish to pay the amount remaining due upon the bond.

On the affidavits it appeared that negotiations between the bondholder and the parish officers had been pending during the interval between default and the application to this Court.

Held, that the charge under stat. 6 & 7 W. 4, c. 96, s. 3, was a charge on the rates generally, and might be enforced against the rates in years subsequent to the five years next after the making of the charge.

Held, also, that the applicant was bound to come promptly to the court, or to explain his delay; but (*dubitante* Crompton, J.) that in the present case the delay was sufficiently explained. *Regina v. Overseers of Hurethourne Tarrant*, 246

V. Rights of rated inhabitants.

Of the owner of a tenement of not more than 6*l.* value, when assessed, to vote at vestry meetings, under Sturges Bourne's Act.

Where the Small Tenements Act, 13 & 14 Vict. c. 99, has been adopted in a parish, the owner of a tenement of a value not exceeding 6*l.*, who has been assessed to the poor-rate instead of the occupier, is, by virtue of Sturges Bourne's Act, 58 G. 3, c. 69, entitled to vote at all vestry meetings in respect of such tenement: but the occupier has no such vote. But, for whatever number of tenements such owner is assessed, he can, at the utmost, give no more than six votes, the restriction in sect. 3 of stat. 58 G. 3, c. 69, being applicable. *Richardson v. Gladwin*, 138

SECONDLY: Church-Rate.

VI. Summons for non-payment. Validity of rate disputed under stat. 53 G. 3, c. 137, s. 7.

Amount of jurisdiction in justices, 852.
JURISDICTION, IV. (5).

THIRDLY: Rates made under The Public Health Act, 1848 (11 & 12 Vict. c. 63). PUBLIC HEALTH ACT.

FOURTHLY: Rates made under The Metropolis Local Management Act (18 & 19 Vict. c. 120). METROPOLIS LOCAL MANAGEMENT ACT, III.

REGULA GENERALIS.

Easter Term, 1858, 255.

REMOVAL.

Of pauper. POOR, I.

RENT-CHARGE.

Tithe commutation. Rateability of owner to poor-rate: net annual value, how to be calculated: what are proper deductions, I. RATE, I. (1).

REPAIR.

Of highway. HIGHWAY.

REPLICATION.

PLEADING, IV.

RESCINDING.

Of contract. CONTRACT, VI.

RESPONDENT.

APPEAL.

SALE.

VENDOR AND VENDEE.

SERVANT.

MASTER AND SERVANT.

SESSIONS.

I. County Sessions for Middlesex. Clerk of the peace for Westminster: his present duties and emoluments, under stat. 7 & 8 Vict. c. 71, 267. CLERK OF THE PEACE.

II. Appeal to. APPEAL.

SETTLEMENT.

Of pauper. POOR, I.

SEWER.

I. What is within sects. 68, 69, 76, 204, of The Metropolis Local Management Act (18 & 19 Vict. c. 120), 408. METROPOLIS LOCAL MANAGEMENT ACT, I.

II. Reservation to landlord of the exclusive right to use a sewer. Action by him for interruption of the easement, 512. LANDLORD AND TENANT, I. (1).

SEWERS' RATE.

METROPOLIS LOCAL MANAGEMENT ACT, III.

SHARES.

COMPANY.

SHIP.

I. What is a passenger ship, within the Passengers Act, 1855.

Under sects. 3 and 71 of The Passengers Act, 1855 (18 & 19 Vict. c. 119), a sailing ship is not a passenger ship because she carries more than thirty passengers, or more than one statute adult passenger to every fifty tons, if that number or proportion is not made up without reckoning cabin passengers; and, where persons are cabin passengers in all respects except that of having received contract tickets in the form in Schedule (K.), which in its terms applies to passenger ships only, such persons, for the purpose of estimating the number or proportion, are to be reckoned as cabin passengers; and unless, without including them, the number or proportion is not made up, the ship is not a passenger ship. *Ellis v. Pearce*, 431

II. Stowage of cargo, under Customs Clauses Consolidation Act, 1853, ss. 170, 171, 172. Neglect of those provisions by master does not vitiate an insurance on the cargo by an innocent party, 670. INSURANCE, II. (2).

III. Unseaworthiness through plaintiffs' misconduct; when a defence to an action by him on a time policy, for a total loss, 1038. INSURANCE, II. (1).

IV. Construction of charter-party. Clause exempting the freighter's agent, the maker, from liability.

A memorandum for a charter-party, made between plaintiffs, shipowners, and defendant, "as agent for the freighter" (no principal being named), after providing for "demurrage over and above the said lying days at 7*l*. per day," stated that "it is further agreed that, this charter being concluded by" defendant "for another party, the liability of the former in every respect, and as to all matters and things, as well before as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo."

Held that the defendant was not liable, upon this memorandum, for demurrage at the port of discharge. *Ogleby v. Yglesias*, 930

V. Claim of lien on, by shipwrights, for costs of detention in their dock, after repairing, the repairs not having been paid for; held bad, 353. LIEN, I.

SLANDER.

LABEL.

SMALL TENEMENTS ACT.

(13 & 14 Vict. c. 99.)

RATE, V.

SPECIAL CASE.

Stated under stat. 20 & 21 Vict. c. 43. Notice to respondent: proceedings on his non-appearance, 469. PAWNBROKER

STATUTES.

First: General Public.

I. 1 El. c. 17, s. 3. (Breadth of meshes of net for fishing), 171. FISHING.

II. 21 Ja. 1, c. 16. (Limitation of Actions.) STATUTE OF LIMITATIONS.

III. 29 C. 2, c. 13. (Statute of Frauds.) STATUTE OF FRAUDS.

IV. 3 & 4 Anne, c. 9. (Promissory Notes), 459. BILLS OF EXCHANGE AND PROMISSORY NOTES, I. (2).

V. 17 G. 3, c. 53. (Borrowing money by incumbent to build parsonage), 1. RATE, I. i.

VI. 39 & 40 G. 3, c. 99. (Pawnbrokers.) Sect. 24. Penalty for injury to goods, 469. PAWNBROKER.

VII. 41 G. 3, c. 23. (Collection of Poor-Rates.)

Sect. 1. Taking rate as payment on account for the next, 259. RATE, II.

VIII. 58 G. 3, c. 99. (Sturges Bourne's Act), 138. RATE, V.

IX. 1 & 2 W. 4, c. 32. (Poaching.)

Sect. 23. Penalty for using engines, &c., to take game, 91. EVIDENCE, I.

X. 4 & 5 W. 4, c. 76. (Poor Laws Amendment.)

Sects. 46, 109. Appointment of auditor, 583. METROPOLIS LOCAL MANAGEMENT ACT, IV.

XI. 5 & 6 W. 4, c. 50. (General Highway Act.) HIGHWAY ACT.

XII. 5 & 6 W. 4, c. 76. (Municipal Corporations Reform.) MUNICIPAL CORPORATIONS REFORM ACT.

XIII. 6 & 7 W. 4, c. 71. (Tithe Commutation.)

Sect. 69. Rateability of rent-charges, 1. RATE, I. (1).

XIV. 6 & 7 W. 4, c. 96. (Parochial Assessment.)

(1). Application of principle, in rating a tithe commutation rent-charge, 1. RATE, I. (1).

(2). Sect. 3. Survey of parish, 246. RATE, IV.

XV. 1 & 2 Vict. c. 23. (Borrowing money by incumbent to build parsonage), 1. RATE, I. (1).

XVI. 1 & 2 Vict. c. 110. (Abolishing arrest by mesne process, &c.)

Sect. 3. Writ of capias, 65. ARREST, I.

XVII. 2 & 3 Vict. c. 93. (County Police), 225. RATE, I. (4).

XVIII. 3 & 4 Vict. c. 88. (County Police Act Amendment), 225. RATE, I. (4).

XIX. 5 & 6 Vict. c. 109. (Parish Constables).

Sects. 2, 3. Making out list of persons competent to serve, 519. CONSTABLES.

XX. 7 & 8 Vict. c. 71. (Middlesex Sessions.) Duties and emoluments of clerk of the peace for Westminster, 267. CLERK OF THE PEACE.

XXI. 8 & 9 Vict. c. 20. (Railways Clauses Consolidation.) RAILWAYS CLAUSES CONSOLIDATION ACT.

XXII. 9 & 10 Vict. c. 93. (Action by representatives of persons killed by accident), 168. EXECUTOR, I.

XXIII. 10 & 11 Vict. c. 17. (Waterworks Clauses), 176. WATERWORKS.

XXIV. 11 & 12 Vict. c. 31. (Orders of removal.)

(1). Sect. 3. Application for depositions, 253. MANDAMUS, II.

(2). Sect. 9. Appeal, 713. APPEAL, II.

XXV. 11 & 12 Vict. c. 63. (Public Health.) PUBLIC HEALTH ACT.

XXVI. 12 & 13 Vict. c. 106. (Bankrupt Law Consolidation.) BANKRUPT LAW CONSOLIDATION ACT.

XXVII. 13 & 14 Vict. c. 61. (County Courts Amendment.)

Sect. 14. Security for costs of appeal, 504. COSTS, II.

XXVIII. 13 & 14 Vict. c. 99. (Small Tenements), 138. RATE, V.

XXIX. 14 & 15 Vict. c. 99. (Evidence Amendment), 91. EVIDENCE, I.

XXX. 15 & 16 Vict. c. 76. (Common Law Procedure, 1852.) COMMON LAW PROCEDURE ACTS.

XXXI. 15 & 16 Vict. c. 85. (Burials Amendment.) BURIAL ACTS.

XXXII. 16 & 17 Vict. c. 107. (Customs Clauses Consolidation.) CUSTOMS CLAUSES CONSOLIDATION ACT.

XXXIII. 17 & 18 Vict. c. 31. (Railway Traffic and Canal.)

Sect. 7. Special contracts: just and reasonable conditions, 958. CARRIERS.

XXXIV. 17 & 18 Vict. c. 125. (Common Law Procedure, 1854.) COMMON LAW PROCEDURE ACTS.

XXXV. 18 & 19 Vict. c. 108. (Coal Mines Inspection.)

Sect. 14. Penalties, 474. MANDAMUS, IV.

XXXVI. 18 & 19 Vict. c. 119. (Passengers Act.)

Sects. 3, 71. Definition of "Passenger Ship:" penalties for not delivering contract tickets, 431. *SHIP, I.*

XXXVII. 18 & 19 Vict. c. 120. (Metropolis Local Management.) *METROPOLIS LOCAL MANAGEMENT ACT.*

XXXVIII. 18 & 19 Vict. c. 122. (Metropolitan Building.)

Sects. 3, 51. Fees to district surveyor, 126. *METROPOLITAN BUILDING ACT.*

XXXIX. 19 & 20 Vict. c. 47. (Joint Stock Companies Act, 1856)

Sect. 31. Signing of a bill of exchange, &c., by officer of company, 449. *BILLS OF EXCHANGE AND PROMISSORY NOTES, I. (1).*

XL. 19 & 20 Vict. c. 108. (County Courts Amendment.)

Sects. 33, 34. Taxation of costs, 737, 123. *COUNTY COURT, I. (1), (2).*

XLI. 20 & 21 Vict. c. 43. (Summary Proceedings before Justices.)

Sect. 2. Statement of special case, 469. *PAWNBROKER.*

XLII. 20 & 21 Vict. c. 77. (College of Doctors' Commons.)

Sects. 116, 117. Surrender of charter and disposition of property, 863. *DOCTORS' COMMONS.*

SECONDLY: Local and Personal, Public.

XLIII. 4 G. 3, c. 43. (St. John, Hackney: Poor, Lighting, and Watching), 1. *RATE, I. (1).*

XLIV. 45 G. 3, c. 33. (Carmarthen Salmon Fishing), 171. *FISHING.*

XLV. 50 G. 3, c. cxc. (St. John, Hackney: Poor: Amending Act), 1. *RATE, I. i.*

XLVI. 59 G. 3, c. xxxix. (St. Pancras Vestry), 583. *METROPOLIS LOCAL MANAGEMENT ACT, IV.*

XLVII. 5 G. 4, c. cxii. (Plymouth Paving, &c.), 691. *PUBLIC HEALTH ACT.*

XLVIII. 5 G. 4, c. cxvii. (Paddington Paving, Lighting, and Watching), 600. *METROPOLIS LOCAL MANAGEMENT ACT, III. (2).*

XLIX. 9 G. 4, c. xxvi. (Stalybridge Lighting and Watching), 107. *CONTRACT, II.*

L. 5 & 6 W. 4, c. cvii. (Great Western Railway.)

Sect. 223. Notice of action, 837. *RAILWAYS CLAUSES CONSOLIDATION ACT.*

LI. 5 & 6 Vict. c. cvi. (Liverpool Improvement and Police.)

Sect. 251. Disorderly house, 123. *DISORDERLY HOUSE.*

LII. 18 & 19 Vict. c. cxxix. (Chesterfield

Waterworks and Gas Company Extension), 176. *WATERWORKS.*

STATUTE OF FRAUDS.

(29 C. 2, c. 3.)

I. Sect. 4. Sale of an interest in lands, what is.

By agreement, not in writing, between plaintiff and defendant, it was agreed that plaintiff should take possession of a brickyard, which defendant was occupying as tenant, and take the plant and bricks there at a valuation: and that defendant should pay up all rent then due, and endeavour to induce the landlord to accept plaintiff as tenant.

Plaintiff took possession of the brickyard, and gave defendant a warrant of attorney as security for payment of the sum at which the bricks and plant were valued. A distress was afterwards put in upon the premises, and the plant and bricks sold, for rent due from defendant before the agreement; and plaintiff was turned out of possession by the landlord.

In an action by plaintiff against defendant, for the breach of the agreement to pay up the rent:

Held, that the contract and consideration were each single and entire; that the contract, taken in its entirety, was a contract for the sale of an interest in lands, and, not being in writing, was voidable under sect. 4 of the Statute of Frauds; and that plaintiff, therefore, could not sever and sue upon that part which related to the payment of the rent. *Hodgson v. Johnson*, 685

II. Sect 17.

(1). Acceptance and receipt by vendee.

Defendant, at Lancaster, verbally ordered goods of the value of more than 10*l.* to be sent to him at Lancaster from London by plaintiff; and he directed that the goods should be sent by sea from G.'s wharf, which was the only wharf in London whence goods were shipped for Lancaster; and from which wharf goods had previously been sent by plaintiff to defendant. Plaintiff sent the goods to G.'s wharf; whence the wharfinger sent them by a ship, selected by himself, for Liverpool; but the cargo was lost by the ship being wrecked on her voyage from London to Liverpool. An invoice was sent, at the time of the shipment, by plaintiff to defendant; which defendant never received.

Held: that the defendant did not accept and actually receive the goods, within the meaning of sect. 17 of the Statute of Frauds (29 C. 2, c. 3). *Hart v. Bush*, 494

(2). Memorandum of contract, signed by agent. Oral evidence of custom, to explain, 1004. *CONTRACT, V. i. (2).*

STATUTE OF LIMITATIONS.

(21 JA. 1, c. 16).

Sect. 3. Limitation of personal actions.

Declaration alleged that plaintiff was owner of the reversion of a messuage entitled to the support of the underground mines and earth of the contiguous ground, and that defendant, well knowing, &c., negligently, and without leaving proper support, worked the mines under the contiguous land, and kept and continued the messuage, and caused it to remain, without proper support; whereby it became injured. Plea: That the cause of action did not accrue within six years.

It appeared that the messuage was an ancient house: and that defendant, more than six years before action brought, worked the mines at 280 yards distance from the house, in such a manner that the earth intervening between the place of working and the foundation of the house, gradually gave way, and finally, within six years of action brought, the effect reached the foundation of the house, which was thereby injured. Till within the six years, no actual damage to the house occurred, nor was the act of defendant known to plaintiff.

Held, by the Court of Q. B. (Lord Campbell, C. J., Coleridge and Erle, Js., dissentiente Wightman, J.), that the defendant was entitled to the verdict.

Judgment reversed in Exchequer Chamber.
Bonomi v. Backhouse, 622

STOPPAGE IN TRANSITU.

VENDOR AND VENDEE, II.

STREET.

What is within sects. 130, 250, of The Metropolitan Local Management Act (18 & 19 Vict. c. 120), 743. METROPOLIS LOCAL MANAGEMENT ACT, II.

STURGES BOURNE'S ACT.

(58 G. 3, c. 69).

RATE, V.

SUBPŒNA.

WITNESS, I.

SUMMONS.

Writ of. COMMON LAW PROCEDURE ACTS, I. i.

SURETY.

PRINCIPAL AND SURETY.

SURVEY.

Of parish, under stat. 6 & 7 W. 4, c. 96. Charge on poor-rates for repayment of expenses, 246. RATE, IV.

SURVEYOR.

I. Under Highway Act. HIGHWAY ACT, II.

II. Under The Metropolitan Building Act. METROPOLITAN BUILDING ACT.

TAXATION.

Of costs. COSTS, III.

TENANT.

LANDLORD AND TENANT.

TENANTS IN COMMON.

Joinder of, in ejectment, under Common Law Procedure Act, 1852, 81. COMMON LAW PROCEDURE ACTS, I. iii.

TENANT'S PROFITS.

When to be deducted from gross annual value of a tithe commutation rent-charge, in estimating net annual value, 1. RATE, I. i.

TENDER.

Of rent. LANDLORD AND TENANT, II.

TITHES.

Commutation of. Rateability of owner of the rent-charge to poor-rate. Net annual value, how to be calculated; what are proper deductions, 1. RATE, I. i.

TOTAL LOSS.

INSURANCE.

TRADE.

Usage of. CONTRACT, V.

TREASURER.

To a borough, under The Municipal Corporations Reform Act. MUNICIPAL CORPORATIONS REFORM ACT, II.

TRIAL.

ACTION.

TROVER.

ACTION.

USAGE.

CONTRACT, V.

VENDOR AND VENDEE.

I. Sale on a warranty. Action by vendee, having resold on a similar warranty, against vendor, for breach of the warranty: measure of damages, 84. DAMAGES, II.

II. Sale to a third party, by vendee, of goods still in the possession of the first vendor: effect of acceptance, by such vendor, of the delivery order.

A. purchased from D. certain goods, lying at D.'s bonded warehouse under the charge of D.'s warehouse keeper, and entered at the Custom House in D.'s name; A. paid D. by

bills at three months. On the same day A. sold part of the goods, still lying at D.'s warehouse, to P., and gave him a delivery order on D. for specific goods. D., on receiving it, placed it on the file, and (unknown to P.) put P.'s name, as purchaser, opposite the entry of the specified goods in the sale book, in which he had originally entered A.'s name as purchaser. P. afterwards, on several occasions, gave to D. delivery orders for portions of the goods. D. thereupon signed a delivery order to his warehouse keeper, and those portions were delivered to P., he paying the duty. Without a delivery order by D. and payment of duties, the goods would not be delivered from the warehouse.

A. afterwards, and before the bills given by him were due, became insolvent; and the bills were dishonoured. D. refused to deliver the remainder of the goods to P., alleging that he was entitled to detain them till A.'s debt to him was paid.

Held, that he had no such right: that, by accepting the delivery order given by A. to P., without giving notice to P. of any contingent claim upon the goods in respect of A., D. must be held to have recognised P. as entitled to the absolute right in the property and the possession of the goods, and could not, as against P., set up any subsequent claim in respect of A. *Pearson v. Dawson*, 448

III. Sale by auction. Construction of conditions of sale: forfeiture of deposit-money.

Plaintiff put up for sale by auction real property, upon conditions of sale which stipulated that the purchaser of each lot should "forthwith pay into the hands of the auctioneer a deposit of 20 per cent. on the purchase-money, and sign the agreement" to pay the remainder, and "that, if the purchaser of either lot shall fail to comply with these conditions, the deposit-money shall be actually forfeited to the vendor, who shall be at full liberty to resell such lot either by public auction or private contract; and any deficiency that may arise upon such resale, together with all expenses attending the same, shall immediately after such second sale be made good by such defaulter; and, on non-payment thereof, such amount shall be recoverable by the vendor as and for liquidated damages." Defendant became a purchaser at the auction, but did not pay the deposit or complete the purchase. Plaintiff resold at a price below that for which defendant had purchased; and the deficiency, with the expenses of sale, exceeded the amount of the deposit.

Held: that plaintiff was entitled to recover from defendant the amount of the deficiency and expenses only, and not, in addition to this, the amount of the deposit.

Per Curiam. Had the deposit been paid, and the bargain completed, the deposit

would have gone in part payment of the purchase-money: and, in the case of the non-completion of the bargain, if the deficiency and expenses had together been less than the deposit, the purchaser would have been entitled to the whole deposit, but nothing more. *Ockenden v. Henley*, 485

IV. Acceptance by vendee within Statute of Frauds. STATUTE OF FRAUDS, II.

V. Sale of interest in lands. STATUTE OF FRAUDS, I.

VI. Transfer of shares. CONTRACT, VI. vii.

VII. Lien. LIEN.

VESTRY.

I. Right of owner of tenement under 64. in value, when assessed, to vote at vestry meetings under Sturges Bourne's Act: restriction of number of votes, 138. RATE, V.

II. Summoning of vestry, under stat. 5 & 6 Vict. c. 109, for the purpose of making out a list of persons competent to serve as parish constables: its duty, upon such summons, 519. CONSTABLES.

III. Functions and duties of vestry under The Metropolis Local Management Act. METROPOLIS LOCAL MANAGEMENT ACT.

[WAIVER.

Of breaches of covenant: see LANDLORD AND TENANT, I. (3.)]

WARRANTY.

Sale on a warranty. Action by vendee, having resold on a similar warranty, against vendor, for breach of the warranty: measure of damages, 84. DAMAGES, II.

WATERWORKS.

What is water for domestic use, within sect. 35 of The Waterworks Clauses Act (10 & 11 Vict. c. 17.)

A local Act (18 & 19 Vict. c. xxix., for Chesterfield) required a water company to furnish to occupiers of houses, who should "demand a supply of water for domestic use," a sufficient supply thereof, at rents fixed according to the assessment of the houses to the poor-rate. The Act incorporated The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17). An occupier was assessed upon his house and premises, including a coach-house, stable, and yard. He kept, for private use, a carriage in the coach-house and a horse in the stable; and, on the premises, he applied, for the horse and for washing the carriage, water supplied by the company for domestic use.

Held, that he was entitled to do so, the water being, within the meaning of the Act, applied to domestic use. *Burby v. Chesterfield Waterworks Company*, 176

WATERWORKS CLAUSES ACT.

(10 & 11 Vict. c. 17.)

WATERWORKS.

WATERWORKS COMPANY.

WATERWORKS.

WESTMINSTER.

Clerk of the peace for. CLERK OF THE PEACE.

WILL.

EXECUTOR.

WITNESS.

I. Verdict for defendant. Recovery from plaintiff, by witness attending on plaintiff's subpoena, of expenses paid to him by defendant, but repaid, according to agreement, on being disallowed on taxation, at plaintiff's instance.

On an action by B. against E., H., an attorney, having been required by E. to attend as a witness in London, had come from the country to London for the purpose. E. told H., after he had been in London one day, that he might return to his residence; but, before H. did so, H. was subpoenaed by B., and told that he must attend in obedience to B.'s subpoena. H. accordingly remained from home five days from the service of the subpoena, then went home, and afterwards returned to London, where he afterwards remained for five days up to the trial. The verdict was for E. After the trial, E.

paid H. his expenses, and an allowance for time, for eleven days, on condition that, if any part was disallowed on the taxation between the parties, H. would repay so much to E. On the taxation between B. and E., E.'s attorney deposed, in his affidavit of increase, to this payment to H., but did not mention the condition. B., at the taxation, objected to the allowance of the sum paid in respect of the time during which H. was not detained at the request of E.; and the Master struck off so much as related to five days; and H. returned that sum to E. Then H. sued B. for his expenses and time in respect of the five days.

Held, that H. was entitled to recover this from B., the repayment by H. to E. having been proper, and having placed H. in the same position as if he had never received from E. the sum so repaid. *Hale v. Bates*,

575

II. Commission to examine. COMMISSION.

III. Competency of. EVIDENCE, I.

WORKS.

Board of, under The Metropolis Local Management Act. METROPOLIS LOCAL MANAGEMENT ACT, I.

WRIT OF ERROR.

ERROR.

WRIT OF SUMMONS.

COMMON LAW PROCEDURE ACTS, I. 1.

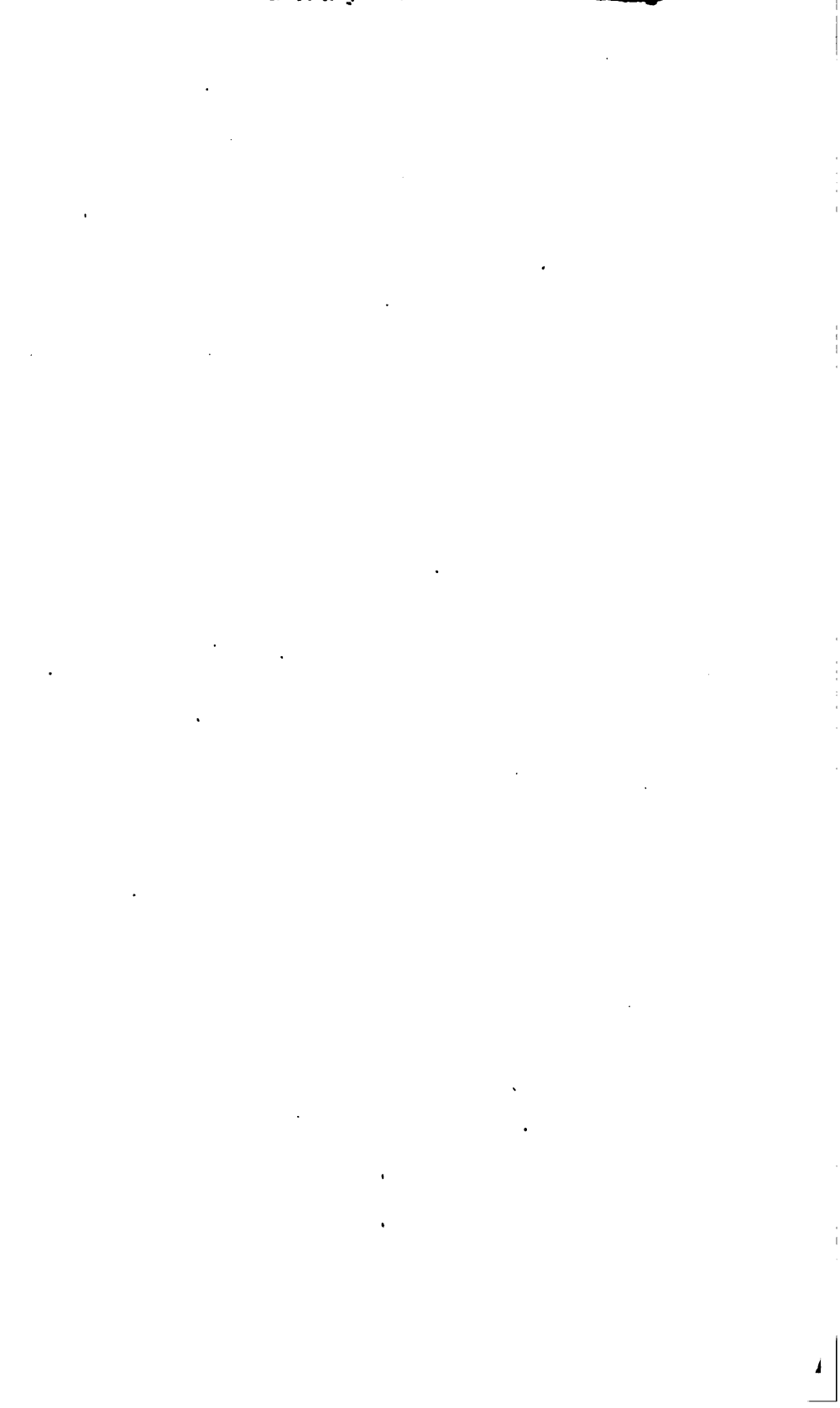
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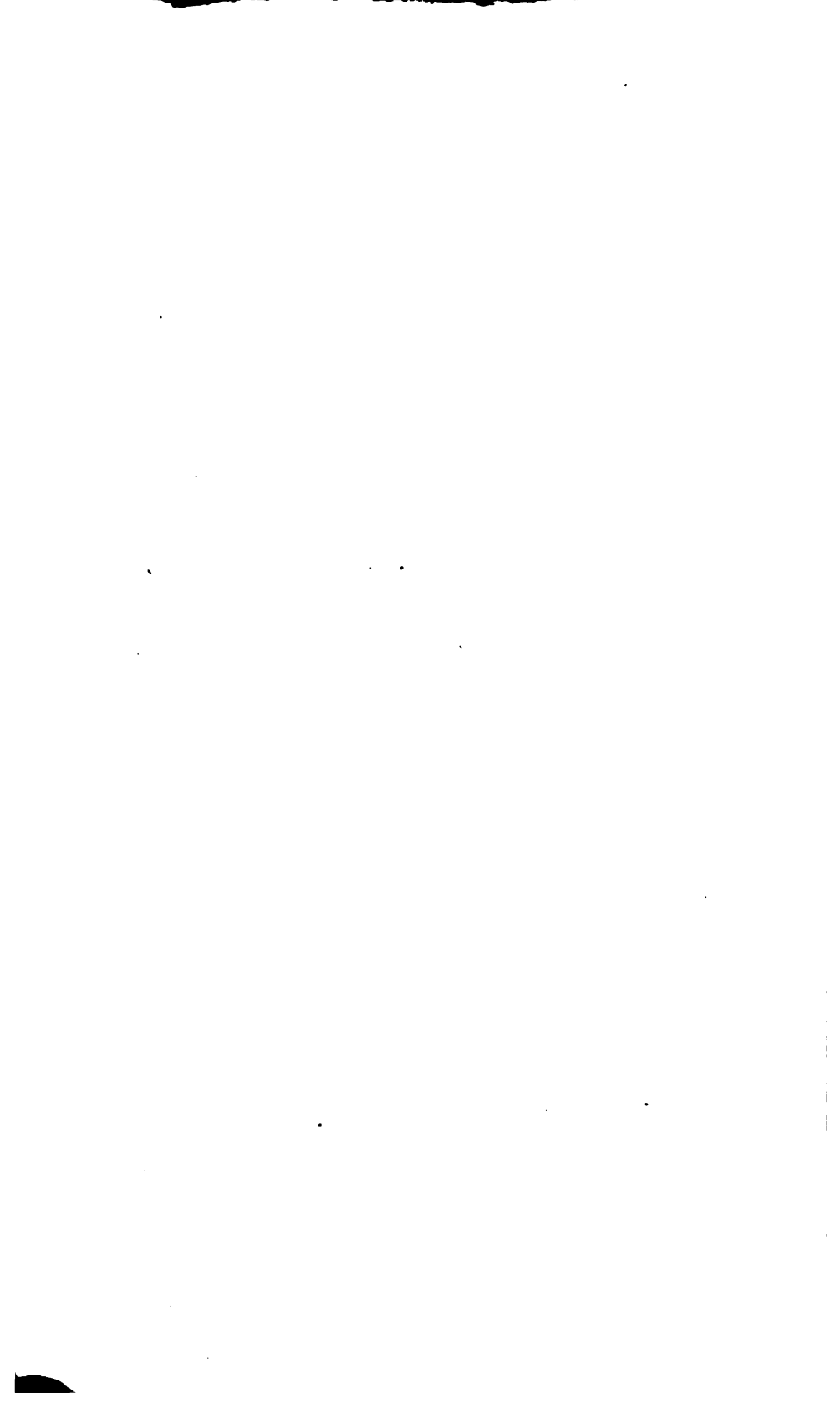
















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